In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RETIRED CHICAGO POLICE ASSOCIATION,
Plaintiff-Appellant,
and
Clinton A. Krislov, Appellant/Cross-Appellee,
and
Krislov & Associates, Ltd., Appellant,

v.

CITY OF CHICAGO, Walter Knorr, Richard M. Daley, Miriam Santos, and the Policemen's Annuity and Benefit Fund, Defendants-Appellees,
and
Fireman's Annuity and Benefit Fund,
Defendant-Appellee/Cross-Appellant.

Nos. 94-1885, 94-2404, 94-2580, 94-2719, 94-2950 and 94-2965.

Argued Sept. 11, 1995.
Decided Feb. 13, 1996.
Rehearing Denied April 4, 1996.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 90 C 407 & 91 C 6200—Suzanne B. Conlon, Judge.

Before BAUER, KANNE, and DIANE P. WOOD, Circuit Judges.

KANNE, Circuit Judge.

This case concerns the propriety of the district court's denial of the associational standing of the Retired Chicago Police Association ("RCPA") to represent its members against the City of Chicago, several city officials, and the Policemen's Annuity and Benefit Fund. Also at issue are the district court's decisions to sanction the attorney for the RCPA, to enforce those sanctions through civil contempt, and to deny supplemental sanctions sought by the Fireman's Annuity and Benefit Fund to compensate it for the costs of enforcing the sanctions award.

This is the second time this matter has been appealed to this court. *See Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584 (7th Cir.1993) ("RCPA I"). Our previous decision, as well as a related case brought in Illinois state court, *City of Chicago v. Korshak*, 206 Ill.App. 3d 968, 151 Ill.Dec. 797, 565 N.E.2d 68 (1990), *appeal denied*, 139 Ill.2d 594, 159 Ill.Dec. 105, 575 N.E.2d 912 (1991), *cert. denied*, 503 U.S. 918, 112 S.Ct. 1291, 117 L.Ed.2d 515 (1992), contains many of the background facts of this dispute. In this opinion, we review only those facts pertinent to this appeal.

I

This case originally began as an action by the RCPA against the City of Chicago and several city officials (collectively the "City") and the city's four pension funds ("Funds"). The RCPA sought relief under 42 U.S.C. § 1983 on the grounds that a settlement entered into by the City and the Funds violated provisions of the United States and Illinois Constitutions. The RCPA further asserted breach of contract, estoppel, and breach of fiduciary duty claims.

The settlement that is at the center of this dispute was the result of a state declaratory judgment action brought by the City against the Funds, wherein the City sought both a declaration that it had paid more than it was legally obligated to pay for the health care of the Funds' members and a determination of the City's future obligations. *City of Chicago v. Korshak*, No. 87 CH 10134 (Chancery Div., Circuit Court Cook County, Dec. 12, 1989). The Funds counterclaimed, and several annuitants successfully intervened. The annuitants were certified as representatives of a class of annuitants that retired from City employment on or before December 31, 1987 (the "Korshak class"). The RCPA was not a party to this litigation; it had made motions to intervene and for class certification, but those motions were denied.

Prior to the state court decision, the Funds and the City entered into a settlement under which they agreed to cosponsor legislation that would change the Illinois Pension Code. The legislation, which was eventually enacted, increased the amount the Funds would contribute to the health care premiums of their annuitants, required the City to pay at least 50 percent of the cost of the annuitants' health care premiums through 1997, and made the annuitants responsible for paying the remaining portion of their premiums. The annuitants challenged the fairness of the settlement; they had wanted to compel the City to continue providing the prelitigation health care coverage and to preclude the City from raising the cost of that coverage. The trial court found the settlement to be fair, and the settlement was affirmed on appeal. *Korshak*, 151 Ill.Dec. at 801, 565 N.E.2d at 72.

During the pendency of the appeal, the RCPA filed a class action against the City and the Funds in federal

court. The proposed class consisted of the annuitants from the four Funds who had begun participation in the City's Healthcare Annuitant Plan after December 31, 1987 (the end date of the Korshak class) but before August 23, 1989 (the date that the settlement legislation became effective). A group of individuals participating in the Policemen's Fund and a political action committee sought to intervene. The attorney for the RCPA, Clinton A. Krislov, also filed a separate complaint (one nearly identical to the RCPA complaint) on behalf of the same class that had intervened in the Korshak litigation (the "Ryan class"). The two cases were consolidated.

The district court dismissed the Ryan class on res judicata grounds and, after denying the RCPA's motion for class certification, dismissed the remainder of the case on the ground that the RCPA lacked associational standing. The district court also denied motions for intervention and class certification filed by the would-be intervenors. The RCPA, the Ryan class, and the would-be intervenors appealed.

We affirmed the district court's rulings on all of the issues appealed, except the denial of the RCPA's associational standing. *RCPA I*, 7 F.3d at 609. We reversed and remanded that issue to the district court. The effect of our affirmance of the denial of class certification was to dismiss three of the four Funds from the litigation. The remaining Fund, the Policemen's Annuity and Benefit Fund, remained in the litigation because members of the RCPA were participants in that fund.

While the case was on appeal to this court, the City and the Fireman's Fund filed postdismissal motions for sanctions against Krislov for alleged abuses that occurred during the litigation prior to appeal. The City

sought sanctions under both FED.R.CIV.P. 11 and 28 U.S.C. § 1927, and the Fireman's Fund sought sanctions only under Rule 11. The district court referred the matter to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A). The magistrate judge issued an order that the City and the Fireman's Fund were entitled to sanctions. Based on submissions from the City and the Fireman's Fund, the magistrate judge issued a report recommending sanctions against Krislov of $42,003.34 to the City and $45,285.00 to the Fireman's Fund. After rejecting objections from Krislov, the district court eventually ordered Krislov to pay all the sanctions recommended by the magistrate judge.

The district court's order directed Krislov to pay the sanctions to the City and the Fireman's Fund by February 22, 1994. After Krislov failed to meet that deadline, as well as successive deadlines, the district court held him in civil contempt. Krislov paid the sanctions and accrued fines after the district court granted a writ of body attachment filed by the Fireman's Fund. The district court later denied the Fireman's Fund's request for supplemental sanctions for the costs it incurred in enforcing the sanctions award.

After remand of the associational standing issue, the district court again entered an order dismissing the case for lack of associational standing. The RCPA filed a FED.R.CIV.P. 59(e) motion to alter or amend the judgment,[1] which the district court denied.

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[1] The RCPA's motion was actually titled "Request for Reconsideration" and did not reference Rule 59(e). However, because the motion was filed within ten days of the entry of the judg-

(continued...)

II

Prior to reviewing the RCPA's challenge to the district court's decision to dismiss the case for lack of associational standing, we must first ascertain the procedural mechanism by which standing was denied. The RCPA and the City characterize the district court's decision as a grant of summary judgment. The Policemen's Fund argues that the district court dismissed the case for lack of subject matter jurisdiction under FED.R.CIV.P. 12(b)(1). We agree with the latter characterization.

After raising the issue sua sponte, the district court did not specify the provision under which it was dismissing the case for lack of associational standing. However, the record leads us to infer that the district court intended to dismiss the case pursuant to Rule 12(b)(1). The only previous challenge to the RCPA's standing had been brought pursuant to a Rule 12(b)(1) motion, and the district court continually referred to its decision disposing of the case for lack of associational standing as a dismissal, rather than a grant of summary judgment. As a result, we shall treat the district court's decision as a dismissal pursuant to Rule 12(b)(1).

We review a district court's decision to grant or deny a motion to dismiss for lack of standing de novo. *Doe v. County of Montgomery, Ill.*, 41 F.3d 1156, 1158 (7th Cir. 1994). Where the district court's resolution of a standing

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[1] (...continued)
ment dismissing the case, the district court treated the RCPA's motion as a Rule 59(e) motion, *see Russell v. Delco Remy Div. of General Motors Corp.*, 51 F.3d 746, 750 (7th Cir. 1995); *Lawshe v. Simpson*, 16 F.3d 1475, 1477 n. 1 (7th Cir. 1994), and so shall we.

question involved disputed factual matters, we will accept the district court's factual findings unless they are clearly erroneous. *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 594 (2d Cir.1993); *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir.1985).

In ruling on a motion to dismiss for want of standing, the district court must accept as true all material allegations of the complaint and must draw all reasonable inferences therefrom in favor of the plaintiff. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed. 2d 343 (1975); *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir.1993). The plaintiff bears the burden of establishing that it meets the required elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Where standing is challenged as a factual matter, the plaintiff bears the burden of supporting the allegations necessary for standing with "competent proof." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936); *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2249, 132 L.Ed.2d 257 (1995). We have interpreted "competent proof" as requiring a showing by a preponderance of the evidence, or proof to a reasonable probability, that standing exists. *NLFC*, 45 F.3d at 237.

III

As we noted in RCPA I, the general rule of standing is that "an injured party 'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' " 7 F.3d at 600

(quoting *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205). This rule flows from a concern that third parties will not adequately represent the individuals whose rights they seek to vindicate. *See Singleton v. Wulff*, 428 U.S. 106, 114, 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1976). The doctrine of associational standing is an exception to the general prohibition of representational standing. In order to obtain associational standing, an organization must meet the three-prong test set forth in *Hunt v. Washington State Apple Advertising Comm'n*: [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *see also Sanner v. Board of Trade*, 62 F.3d 918, 922 (7th Cir.1995).

On remand, the district court denied the RCPA associational standing on three grounds. First, the district court held that the RCPA had failed to prove that it had sufficient resources or expertise to adequately litigate the dispute. Second, the district court held that the RCPA had failed to meet the second prong of the Hunt test because its representation would involve "profound" conflicts of interest that were not amenable to a remedy short of denying standing and the RCPA had failed to show that these conflicts were overcome by authorization of its membership. Third, the district court held that, in addition to precluding standing under the second prong, the profound conflicts of interest caused the RCPA to fail the third prong "because there is not complete identity

between the interests of the organization and its members."[2] The district court denied the RCPA's Rule 59(e) motion to alter or amend the judgment, in which the RCPA attempted to show that the litigation was properly authorized. The RCPA appeals the court's decision to deny standing and its decision to deny the Rule 59(e) motion.

A

Initially, we must disagree with the district court's determination that the RCPA should be denied associational standing because of a lack of resources or expertise. The Hunt test does not contain a requirement that an association maintain a certain level of expertise with regard to the subject matter of the litigation, nor does it require an association to have a certain amount of resources. To the extent the Supreme Court mentioned associations' expertise and resources in *International Union, UAW v. Brock*, 477 U.S. 274, 289, 106 S.Ct. 2523, 2532, 91 L.Ed.2d 228 (1986), it did so in recognition of the fact that because preexisting associations have access to some level of expertise and resources they present more attractive vehicles for representational litigation than class actions. We do not believe that the Court in

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[2] We are not presented with the question of whether the RCPA meets the first prong of the *Hunt* test: that the RCPA's members who retired after December 31, 1987, but before August 23, 1989, "would otherwise have standing to sue in their own right." *Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441. The district court specifically declined to address this question, relying instead on its conclusion that the RCPA had failed to meet the second and third prongs of *Hunt*.

mentioning associations' expertise and resources intended to create an additional requirement that an association must maintain some threshold level of expertise and resources in order to qualify for associational standing, and we see no merit in adding such a requirement. Consequently, the district court erred in denying the RCPA associational standing on this ground.

B

The district court's second basis for denying the RCPA associational standing was that profound conflicts of interest caused the RCPA to fail the second prong of Hunt: that "the interests it seeks to protect are germane to the organization's purpose." 432 U.S. at 343, 97 S.Ct. at 2441. In *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374 (7th Cir. 1987), we held that an association fails to meet the second prong where there is a serious conflict of interest between the organization and its members. We found that "[b]ecause the interests which SSBR seeks to protect by maintaining this action do not reflect and are actually at odds with the interests of some of its members, they certainly cannot be said to be 'germane' to SSBR's overriding purposes, and SSBR cannot invoke representational standing as a basis for suing the defendants." *Id.* at 1381.

Prior to the first appeal in this case, the district court had denied class certification, in part, on the grounds that two conflicts of interest made the RCPA an inadequate class representative. The district court relied primarily on these same two conflicts in finding that the

RCPA failed the second prong of Hunt.[3]

The first conflict of interest considered to be profound by the district court is that some of the RCPA's members, namely widows, pay less for their health care premiums under the settlement legislation than they would if the RCPA were successful in overturning the settlement and returning its members to the prelitigation premium payment relationship. The district court found a second profound conflict in the fact that Richard Jones, an elected RCPA official, voted for the settlement while he was a trustee of the Policemen's Fund, and the RCPA argues in its claim against the Policemen's Fund that the trustees breached their fiduciary duty when they approved the settlement.

We commented in RCPA I that the district court would likely encounter these conflicts again in determining whether the RCPA qualified for associational standing. And although we noted the validity of the first conflict and the fact that the second conflict was "troublesome" when we affirmed the denial of class certification, *RCPA I*, 7 F.3d at 598, we instructed the district court that "the

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[3] A third conflict noted by the district court does not strike us as a conflict. The district court found that even though most of the RCPA's members pay more for their health care benefits now than they did prelitigation, they would pay significantly more if the RCPA were successful in invalidating the settlement legislation which obligated the City to subsidize 50 percent of the premiums until 1997 but were unsuccessful in arguing that the City must provide prelitigation coverage at prelitigation cost. This does not present a conflict of interest but rather the risk inherent in the litigation. If the RCPA were successful in arguing that the City is obligated to provide the prelitigation coverage at prelitigation cost, those members would certainly pay less.

inquiry with respect to associational standing, while similar, is not identical [to the class certification analysis]." *Id.* at 607. Specifically, class certification is improper if the members merely have antagonistic or conflicting claims; only where the litigation would result in "profound" conflicts of interest is associational standing inappropriate. *Id.* at 598.

In *RCPA I*, we noted that there are at least two types of conflicts that will be considered profound and preclude associational standing. First, a profound conflict arises where an association seeks standing to directly sue some of its own members. *RCPA I*, 7 F.3d at 606; *see Southwest Suburban*, 830 F.2d at 1380-81. Second, a profound conflict arises where the association's suit, if successful, would cause a direct detriment to the interests of some of its members and the litigation was not properly authorized. *RCPA I*, 7 F.3d at 606. Only the second type of conflict is at issue in this case.

Although we have not addressed a direct-detriment conflict of interest, it is exemplified by the facts in *Maryland Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246 (4th Cir.), *cert. denied*, 502 U.S. 939, 112 S.Ct. 373, 116 L.Ed.2d 325 (1991). In that case, the association seeking standing was attempting to invalidate the Maryland Minority Business Enterprise statute. The Fourth Circuit noted that the fact that some members of the association benefited under the MBE statute, while others would benefit if the statute were invalidated, caused a conflict of interest. *Id.* at 1253. In reaching the conclusion that the conflict of interest precluded the association from asserting associational standing, the court also focused on the fact that there were irregularities in the authorization of the litigation. Id.

In *RCPA I*, the question of whether the conflicts of interest in this case preclude associational standing was not before us; our discussion of the issue was only intended to provide the district court with some guidance for determining the question on remand. As a result, we did not describe the concerns underlying a direct-detriment conflict of interest, nor did we detail how evidence that the litigation was properly authorized will impact an association's ability to assert associational standing in the face of this type of conflict.

A direct, detrimental effect to some members' interests constitutes a conflict of interest in the associational standing context because it implicates two of the concerns that question the appropriateness of representational standing. First, because the litigation, if successful, would actually harm some members' interests, there is a concern that the litigation is not germane to the association's purposes. See Southwest Suburban, 830 F.2d at 1381. Second, the fact that the litigation, if successful, would harm some members' interests raises a concern that the association will not be fully committed to the litigation and, as a result, will not pursue the litigation with the zealous advocacy necessary to be an adequate representative. These concerns are allayed where the litigation was properly authorized in accordance with the association's procedures. Under such circumstances, the membership has affirmed that the detriment to some members' interests does not render the litigation outside the germane interests of association, and a court can be assured that the association will pursue the litigation with the strong advocacy and persistence necessary to be an effective representative. *See generally Duke Pwr. Co. v. Carolina Env't Study*, 438 U.S. 59, 80, 98 S.Ct. 2620,

2634, 57 L.Ed.2d 595 (1978) (prudential limitations on standing require that a court be assured "that the most effective advocate of the rights at issue is present to champion them"); *National Collegiate Athletic Ass'n v. Califano*, 622 F.2d 1382, 1391-92 (10th Cir.1980) (where it is unclear whether an association's members support the litigation, the association cannot assert associational standing absent the documented support of a majority of its members).

The plaintiff bears the burden of proof that it meets the required elements of standing. *Lujan*, 504 U.S. at 561, 112 S.Ct. at 2136. Consistent with that burden, where a defendant asserts that a direct-detriment conflict of interest precludes an organization from asserting associational standing, the organization bears the burden of coming forward with competent proof to rebut that challenge. *See McNutt*, 298 U.S. at 179, 56 S.Ct. at 785. In light of our discussion above, a plaintiff can defeat a direct-detriment conflict challenge by showing that the litigation, if successful, will not cause a direct detriment to any of its members or that the litigation was properly authorized. We now turn to the conflicts at issue in this case.

1

The first conflict of interest considered "profound" by the district court—detriment to the interests of the widows—is directly analogous to the conflict presented in *Maryland Highways*. Like the minority contractors *in Maryland Highways*, the widow members of the RCPA will be directly harmed if the RCPA is successful in invalidating the settlement legislation and requiring the

City to provide prelitigation coverage at prelitigation cost; the widows would lose the subsidy provided by the settlement legislation, and their premiums would increase from seventeen dollars per month to twenty-one dollars per month. Consequently, the district court was correct in finding that this situation presented a potentially profound conflict of interest. We also agree with the district court's subsequent conclusion that, because the RCPA did not offer any evidence that the litigation was properly authorized, the conflict of interest presented by the direct detriment to the widows' interests was in fact profound.

The district court went on to consider whether "other approaches less drastic than denying group standing" could protect the interests of the members from the dangers presented by this conflict. *RCPA I*, 7 F.3d at 607. Instead of considering the conflicts separately, the district court aggregated them for purposes of this inquiry. We find this analysis problematic because each individual conflict may only impact a portion of the litigation. For instance, the conflict of interest posed by the widows would not affect the RCPA's ability to competently pursue the breach of fiduciary duty claim against the Policemen's Fund. Under that claim, the RCPA is arguing that the Policemen's Fund should be obligated to pay the full cost of the annuitants' share of their health care premiums, a claim that, if successful, would seemingly benefit all members.

Considering separately the conflict caused by the potential direct detriment to the widows' interests, we believe that it may only be resolved by excising from the litigation the claims giving rise to that conflict. This is the case because in the face of concerns that the litiga-

tion is not germane to the association's interests and that the RCPA may not act as an adequate representative, the RCPA has failed to meet its burden of showing that it has standing to pursue those claims. For this reason, the district court was correct in denying the RCPA associational standing to pursue its claims against the City.

In its challenge to the district court's determination of this issue, the RCPA admits that it failed to make a showing that the litigation was properly authorized prior to the district court's decision to dismiss the case, but it argues that its Rule 59(e) motion contained competent proof of authorization. However, whether the district court should have granted the Rule 59(e) motion and considered the proof appended thereto is a separate question from whether the district court erred in dismissing the case for lack of standing because of its finding that the potential harm to the interests of the widows qualified as a profound conflict of interest. Looking at the evidence before the district court at the time it decided to dismiss the case, we believe the district court was correct in finding that, because there was no evidence that the litigation was properly authorized, the conflict of interest posed by the widows precluded the RCPA from asserting associational standing against the City.

2

The second conflict of interest considered "profound" by the district court does not fit into either of the two types of conflicts we have previously found to be profound. The conflict arises from the fact that the RCPA, in alleging that the Policemen's Fund trustees breached their fidu-

ciary duty in voting for the settlement, challenges the decision of Richard Jones, currently an RCPA officer, who voted for the settlement while a Policemen's Fund trustee. Although we previously noted that this particular conflict was "troublesome" in the class action context, *RCPA I*, 7 F.3d at 598, we have not considered whether this type of conflict presents a profound conflict.

In order to determine whether this situation presents a new type of profound conflict of interest, we turn to the two policies that limit the scope of associational standing in the face of conflicts of interest: an association must be an adequate representative of its members' interests, and the litigation must be germane to the association's interests. *See Southwest Suburban*, 830 F.2d at 1381; *see also Singleton*, 428 U.S. at 114, 96 S.Ct. at 2874 (in order to assert representational standing, plaintiff must be an effective representative).

In keeping with these two policies, we find that this conflict of interest presents a new type of "profound" conflict. We reach this result because the RCPA, as a representational plaintiff, actually makes the day-to-day decisions regarding the representational litigation. As the second highest ranking officer in the RCPA,[4] Jones is one of a very few individuals involved in setting the priorities and strategy of the litigation. In light of the importance of such decisions and the fact that the litigation includes a claim that Jones breached his fiduciary duty (which he disputes) we find that the ability of the RCPA to adequately represent its members with respect to that claim is adversely affected. We believe that the

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[4] The RCPA's 1990 annual report discloses that Jones is the RCPA's secretary and only one of three officers.

requirement that the litigation be germane to the association's interests is similarly frustrated in this instance. Challenging the decision of an association officer is substantively similar to the situation in *Southwest Suburban*, where some of the association's members were named defendants. *Southwest Suburban*, 830 F.2d at 1380. In both situations, the associations are attempting to use representational standing as a means to go after their own, something we have already held cannot be germane to an association's purposes. *Id.* at 1381.

Now that we have found this conflict to be profound, we are again faced with the question of whether "other approaches less drastic than denying group standing" can protect the members' interests from the dangers presented by this conflict. *RCPA I*, 7 F.3d at 607. We believe this conflict cannot be negated by a remedy directed at a discrete group of the association's members because all of the association's members are at risk of being negatively affected by the subtle (and potentially not so subtle) impact of this conflict on the breach of fiduciary duty claim. As a result, we find that this conflict may only be resolved by excising it from the litigation. We will, therefore, affirm the district court's decision to deny the RCPA standing to assert the breach of fiduciary duty claim against the Policemen's Fund.

C

The district court also denied associational standing on the ground that the two conflicts of interest noted above precluded the RCPA from meeting the third, "individualized participation" prong of Hunt because there would not be "complete identity between the interests of the

organization and its members." However, as we made clear in *Southwest Suburban* and *RCPA I*, the proper prong under which to consider the impact of conflicts of interest is the second, "germaneness" prong. *RCPA I*, 7 F.3d at 606-07; *Southwest Suburban*, 830 F.2d at 1381. Under that prong, as long as the litigation is germane to the purpose of the organization and any conflicts of interest are not profound, the association may still have standing even if some members dissent from the decision to litigate or the theory of the litigation. The third prong is concerned with whether each member's participation in the litigation would be required—a question we discussed at length and resolved in favor of the RCPA in *RCPA I*. 7 F.3d at 601-03, 607 n. 27. Thus, the only "identity" requirement is found within the second prong, and when that prong is satisfied there is no room to deny standing because of a conflict of interest under the third prong.

IV

The RCPA also appeals the district court's decision to deny its Rule 59(e) motion, in which it sought to offer competent proof that the litigation was properly authorized. The district court denied that motion because it found the RCPA had failed to show that the court had made a clear error of law or fact and because the evidence of authorization was available at the time the RCPA filed its brief in support of associational standing. The district court went on to find that even if it did grant the motion, the evidence offered by the RCPA was insufficient to prove that the litigation was properly authorized.

A Rule 59(e) motion cannot be used to present evidence that could and should have been presented prior to entry of final judgment. *Green v. Whiteco Indus., Inc.*, 17 F.3d 199, 202 n. 5 (7th Cir.1994). We review a district court's decision to grant or deny a Rule 59(e) motion for abuse of discretion. *Souter v. Int'l Union, UAWA*, 993 F.2d 595, 599 (7th Cir.1993).

The evidence of authorization submitted by the RCPA in its Rule 59(e) motion consisted of the deposition testimony of RCPA President John Pierce. Pierce testified that: (1) the decision to file the lawsuit against the City and the Funds was made by the RCPA board; (2) following the board's approval, the decision to litigate was posed to the members at the next regular membership meeting; and (3) a majority of the members present, by hand vote, voted in favor of the litigation. Pierce noted that he did not recall the date of the meeting or the number of members present. However, he stated that information was available in the records of the association.

The RCPA has a colorable argument that the district court abused its discretion in denying the Rule 59(e) motion. A specific challenge that "[t]he RCPA has never demonstrated that its membership has authorized its action in this litigation" was not raised until the Policemen's Fund's brief in opposition to associational standing. That is problematic because, in accord with the district court's briefing schedule, the brief of the Policemen's Fund was filed after the RCPA's brief, and the RCPA was not afforded an opportunity to respond to that challenge through a reply brief. However, even if the district court abused its discretion in denying the motion, it was correct in its alternative finding that the evidence sub-

mitted by the RCPA was insufficient to constitute competent proof of authorization.

Although Pierce testified as to the procedure the RCPA followed in authorizing the legislation, he failed to identify whether a quorum was present at the meeting at which the litigation was voted upon. Without that information, we are unable to determine whether the membership vote was valid. The RCPA could have filled this self-admitted gap in Pierce's testimony by attaching an affidavit to its Rule 59(e) motion setting forth the number of members present at the meeting and whether that number constituted a quorum. As Pierce noted in his deposition, that information was available in the RCPA's records. Its failure to submit an affidavit (or other competent evidence) detailing whether a quorum was present is fatal. Because the RCPA did not set forth competent proof that the litigation was properly authorized in its Rule 59(e) motion, we find that the district court did not err in denying that motion. *See Deutsch v. Burlington Northern R. Co.*, 983 F.2d 741, 745 (7th Cir.1993), *cert. denied*, 507 U.S. 1030, 113 S.Ct. 1845, 123 L.Ed.2d 470 (1993).

V

Clinton A. Krislov argues that the sanctions imposed upon him pursuant to FED.R.CIV.P. 11 and 28 U.S.C. § 1927 are invalid for both procedural and substantive reasons. We do not reach the propriety of the sanctions because we believe that the district court applied the wrong standard of review to the magistrate judge's determinations.

The district judge referred the City's and Fireman's Fund's motions for sanctions against Krislov to a magistrate judge, pursuant to 28 U.S.C. § 636(b)(1)(A).[5] In his revised report, the magistrate judge recommended that sanctions be entered against Krislov in favor of both defendants. Krislov requested that the district court reconsider the magistrate judge's recommendations. The district judge "adopted" the magistrate judge's recommendations after reviewing them for clear error. *See* 28 U.S.C. § 636(b)(1)(A); FED.R.CIV.P. 72(a). One of the

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[5] Some confusion exists in the record because there are two orders referring the sanctions requests to the magistrate judge, and they were made under two different statutory provisions. The first referral order referenced 28 U.S.C. § 636(b)(3), and the second referral referenced § 636(b)(1)(A). In both, the district judge ordered the magistrate judge "to prepare a report and recommendation." A report and recommendation, however, is inappropriate under § 636(b)(1)(A) because the magistrate judge is the actual decision maker. The statute describes a magistrate judge's determination under that section as an "order." § 636(b)(1)(A). A litigant may request that the district judge reconsider the order, but the district judge may only do so where the order is shown to be "clearly erroneous or contrary to law." *Id.* On the other hand, a report and recommendation is appropriate under § 636(b)(1)(B) or (b)(3), where the magistrate judge's role is that of an advisor and the district judge is the actual decision maker. Although the magistrate judge later titled his sanctions determinations as recommendations (the first was an order), the district judge reviewed them under the clear error standard reserved for orders under § 636(b)(1)(A). Consequently, the district judge confirmed her intent to treat the sanctions referral under § 636(b)(1)(A), and we shall review the sanctions determinations as being referred under that subsection. Even though a report and recommendation is inappropriate under that subsection, we shall refer to those portions of the record titled as such for purposes of clarity within the rather voluminous record.

bases on which Krislov challenges the sanctions award is that the district judge erred in not applying a de novo standard of review to the magistrate judge's recommendations. We agree.

In *Alpern v. Lieb*, 38 F.3d 933 (7th Cir.1994), we held that a district judge may not refer a dispute regarding sanctions to a magistrate judge under § 636(b)(1)(A) because the grant or denial of a request for sanctions constitutes a dispositive matter. 38 F.3d at 935. We reasoned that "[a]lthough an award under Rule 11 is conceptually different from a decision on the merits, it requires one party to pay money to another; the denial of a request for sanctions has an effect similar to the denial of a request for damages. The power to award sanctions, like the power to award damages, belongs in the hands of the district judge." *Id.*

The City and the Fireman's Fund argue that *Alpern* is inapposite for two reasons. First, they argue that, unlike in *Alpern*, the motions for sanctions referred to the magistrate judge in this case were a "pretrial matter." In order to avoid the fact that the motions for sanctions were not referred to a magistrate judge until after final judgment dismissing the RCPA's complaint, they argue that our remand of the associational standing question in *RCPA I* "resuscitated" the pretrial nature of the sanctions because the magistrate judge did not recommend, and the district court did not adopt, a specific amount of sanctions until after our remand of the standing issue.

Even if we found merit in the defendants' resuscitation argument, their attempt to distinguish *Alpern* on the grounds that this case concerns a pretrial request for sanctions is unavailing. Although the facts of *Alpern* concerned postdismissal sanctions, our analysis encom-

passed all sanctions requests, whether pre- or postdismissal. We specifically rejected the reasoning of the court in *Maisonville v. F2 America, Inc.*, 902 F.2d 746 (9th Cir. 1990), *cert. denied*, 498 U.S. 1025, 111 S.Ct. 674, 112 L.Ed.2d 666 (1991), which held that sanctions requested prior to a decision on the merits could be referred to a magistrate judge under § 636(b)(1)(A), in favor of the reasoning that a request for sanctions, regardless of when made, is a dispositive matter capable of being referred to a magistrate judge only under § 636(b)(1)(B) or § 636(b)(3). *Alpern*, 38 F.3d at 935 (citing *Estate of Conners v. O'Connor*, 6 F.3d 656 (9th Cir.1993); *Bennett v. General Caster Serv. of N. Gordon Co.*, 976 F.2d 995 (6th Cir.1992)).

The defendants also seek to distinguish *Alpern* on the ground that it concerned sanctions against a party and this case concerns sanctions against a party's attorney. Specifically, they argue that clear error review is proper because, as a motion against an attorney, the motion for sanctions is "not dispositive of a claim or defense of a party." FED.R.CIV.P. 72(a) (emphasis added). While they are correct that an attorney does not become a party by virtue of being the subject of a motion for sanctions, *see Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir.1985), the City's and Fireman's Fund's argument misapprehends the nature of a magistrate judge's authority under § 636 and Rule 72.

Both § 636 and Rule 72 distinguish the proceedings a magistrate judge may conduct (and whether a district judge may defer to the magistrate judge's conclusions) by the type of matter involved, not whether the matter involves parties. Rule 72 distinguishes the magistrate judge determined matters that will receive de novo or

clear error review by whether the matter is dispositive or nondispositive. Furthermore, throughout § 636(a)-(b)(1)(C), the term "party" is only mentioned twice and then not in a way that distinguishes between matters that will receive de novo or clear error review. Consequently, we hold that it is the type of matter, not the status of the entity who is the subject of the matter, that controls for purposes of determining the provision under which a district judge may refer a matter to a magistrate judge and the extent to which a district judge may defer to the magistrate judge's determinations.

The fact that an attorney was the subject of a sanctions request does not change the fact that resolution of a sanctions request is a dispositive matter capable of being referred to a magistrate judge only under § 636(b)(1)(B) or § 636(b)(3), where the district judge must review the magistrate judge's report and recommendations de novo. Because that did not occur here, we will vacate the award of sanctions and remand the matter for a review of the proposed sanctions under the proper standard.

In light of our decision to remand the issue of whether to award sanctions, we do not decide the issue raised by the Fireman's Fund: whether the district court abused its discretion in not awarding additional sanctions for the costs of enforcing the sanctions order. The district court can revisit this issue on remand if it finds that sanctions are warranted.

VI

Krislov challenges the district court's decision to hold him in civil contempt for failing to pay the Rule 11 and

§ 1927 sanctions by the April 15, 1994, deadline set forth in the district court's March 28, 1994, order. Specifically, Krislov argues that under FED.R.CIV.P. 69(a) the district court should have used a writ of execution rather than a civil contempt order to enforce the sanctions. However, as the City and the Fireman's Fund correctly point out, although Krislov challenged the order on other grounds, he failed to raise this argument before the district court. By raising this argument for the first time on appeal he has forfeited it. *Koffski v. Village of North Barrington*, 988 F.2d 41, 44 n. 7 (7th Cir.1993); *United States v. Harty*, 930 F.2d 1257, 1261-2 (7th Cir.), *cert. denied*, 502 U.S. 894, 112 S.Ct. 262, 116 L.Ed.2d 215 (1991). Krislov's response that bringing this argument below would have been futile is unavailing. He made several other arguments against the contempt order (none of which he asserts on appeal), and he offers no reason why he could not also have made this argument. Consequently, he has forfeited it, and we will not decide whether the district court erred in enforcing the sanctions order through civil contempt.

Our determination that the sanctions were invalid does not dictate the conclusion that Krislov should not have been held in contempt for the failure to pay those sanctions within the time ordered. " 'It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.' " *Walker v. City of Birmingham*, 388 U.S. 307, 314, 87 S.Ct. 1824, 1828, 18 L.Ed.2d 1210 (1967) (quoting *Howat v. Kansas*, 258 U.S. 181, 190, 42 S.Ct. 277,

280, 66 L.Ed. 550 (1922)). *Contra Thomassen v. United States*, 835 F.2d 727, 732 (9th Cir.1987).

VII

As a result of our decision today, the district court's order dismissing the RCPA for lack of associational standing is AFFIRMED. The award of sanctions is VACATED and REMANDED for further proceedings consistent with this opinion. Krislov's request for attorney's fees and costs incurred in defending against the sanctions is DENIED. The district court's order holding Krislov in contempt is AFFIRMED. The district judge has had to endure substantial hardship in dealing with this case, and she should not be forced to visit it a third time. Circuit Rule 36 shall therefore apply on remand.

RETIRED CHICAGO POLICE ASSOCIATION,
Plaintiff,

v.

The CITY OF CHICAGO, et al., Defendants.

No. 90 C 407.

United States District Court, N.D. Illinois, E.D.

April 28, 1994.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

Plaintiff Retired Chicago Police Association ("RCPA") sued defendants the City of Chicago ("the city") and three city officials (collectively "the city defendants") as well as four city employee pension funds: the Policemen's Annuity and Benefit Fund ("the police fund"), the Firemen's Annuity and Benefit Fund, Municipal Employees' Annuity and Benefit Fund and the Laborers' and Retirement Board Employees' Annuity and Benefit Fund (collectively "the pension funds"). This court consolidated a companion case, *Ryan v. City of Chicago*, 91 C 6200, with the *RCPA* case on October 10, 1991.

At various points during the litigation, this court denied RCPA's motions for a preliminary injunction. On January 28, 1992, this court granted summary judgment against the *Ryan* plaintiffs. On March 23, 1992, this court denied the proposed intervenors' motions to intervene and RCPA's motion for class certification, and dismissed RCPA's complaint for lack of associational standing. *Retired Chicago Police Ass'n v. City of Chicago*, 141 F.R.D. 477 (N.D.Ill.1992). The Seventh Circuit affirmed all this court's rulings except the last, instead reversing

and remanding the question of RCPA's associational standing. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584 (7th Cir.1993).

BACKGROUND

The lengthy procedural history and facts of this case have been chronicled by this court and the Seventh Circuit. *RCPA*, 7 F.3d at 588-91; *RCPA*, 141 F.R.D. at 480-83. Only those facts relevant to the remanded associational standing issue will be repeated here.

This case involves the health care costs of retired Chicago police officers. Since the early 1980's, the city has made health care coverage available to its retired employees, including the pension funds' annuitants, under the city's self-insured health care plan. In April 1982, the city set the monthly premium for annuitants participating in the health care plan at $55 for a single participant and $21 for a single medicare eligible participant. Later that year, the state of Illinois enacted legislation to take effect January 1983 that required the police and firemen funds to purchase group health insurance for their beneficiaries. The legislation required the police and firemen funds to contribute $55 per month for non-medicare qualified annuitants and $21 per month for medicare qualified annuitants toward the payment of the annuitants, monthly health care premiums. The revenues to cover this 55/21 premium outlay were to be contributed by the city from a special property tax levy. The annuitants were responsible for any premiums exceeding the 55/21 levels, with any excess to be deducted by the police and firemen funds from annuitants' monthly pension checks.

During the 1980's, health care costs rose and the city absorbed the increased costs. In October 1987, however, the city notified the pension funds that it intended to discontinue its subsidization of annuitant health care coverage. The city also sued the pension funds in the Circuit Court of Cook County seeking to terminate annuitant health care coverage and to force the pension funds to reimburse approximately $58 million the city had expended on annuitant health care benefits through September 1987. *City of Chicago v. Korshak*, Circuit Court of Cook County, Chancery Div. No. 87 CH 10134. The state court allowed a group of annuitants to intervene in the litigation, designating these intervenors as representatives for a certified class of annuitants who had retired on or before December 31, 1987 ("the *Korshak* class"). RCPA's motions for intervention and class certification were denied.

The state court dismissed the city's claims but held a bench trial on the pension funds' counterclaims. Before the state court issued its ruling on the counterclaims, however, the city and the pension funds reached a settlement, which the state court approved on December 12, 1989.

Under the terms of the settlement, the city and the pension funds agreed to co-sponsor legislation to alter the Illinois Pension Code. The resulting legislation, which took effect on August 23, 1989, requires the city to pay at least 50 percent of annuitant health care costs through 1997. The legislation increased the pension funds' contribution to individual annuitant health care premiums from 55/21 to 65/35, to be increased again to 75/35 in 1993. The legislation provides that revenues for the pension funds' subsidies continue to be funded by

special city tax levies. Annuitants are responsible for any premium amounts not paid by the city and pension funds; any excess would be deducted from annuitants' monthly pension checks.

RCPA filed suit on behalf of participants in the city's annuitant health care plan whose participation began after December 31, 1987, the end date of the *Korshak* class, but prior to August 23, 1989, the date on which the new legislation was enacted. RCPA claims the *Korshak* settlement agreement is invalid as applied to these annuitants. RCPA claims that these annuitants are entitled to continuation of the 55/21 rates for health care coverage, as purportedly promised to them by the city and the pension funds.

RCPA's complaint raises four categories of claims. First, RCPA claims that the *Korshak* settlement and the resulting legislation altered the terms of the city's health care plan and the obligations of the city and the pension funds in violation of the annuitants' contract clause, due process and equal protection rights under the United States and Illinois Constitutions. The other three categories of claims—breach of contract and estoppel, breach of fiduciary duty by the pension fund trustees, and violations of provisions of the Illinois Constitution—all stem from RCPA's contention that the city had promised the annuitants lifetime health care coverage at unchanged rates and the pension funds had told the annuitants that premium subsidies would be paid by an annuitant's pension fund, thus providing essentially free health care coverage for life.

This court denied RCPA's motion for class certification; the Seventh Circuit affirmed this decision. Thus, the discrete question before this court on remand is: "whether

the RCPA, although not eligible to act as representative for the putative class, may nevertheless maintain the suit in a representational capacity on behalf of its own members." *RCPA*, 7 F.3d at 599.[1] RCPA submits a brief in support of its associational standing; the city defendants and the police fund submit briefs in opposition.

DISCUSSION

As the Seventh Circuit noted in this case, third party standing is limited: "Generally, an injured party 'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' " *RCPA*, 7 F.3d at 600, citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also, International Union United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 281 (1986). However, the Supreme Court has found that "under certain circumstances, injury to an organization's members will satisfy Article III and allow that organization to litigate in federal court on their behalf." *Brock*, 477 U.S. at 281.

In *Warth*, the Court explained the limited circumstances under which associational standing is allowed: The

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[1] Since RCPA is composed of retired police officers (rather than firemen or other city employees), RCPA's possible associational standing would only be proper against the city defendants and the police fund. *See RCPA*, 7 F.3d at 599-600 n. 21 (noting that RCPA's associational standing should be limited to its own members because an association may represent only its members or the substantial equivalent of its members) (citations omitted). Since the other three pension funds do not include retired police officers as members, RCPA does not have standing to bring a claim against them.

association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought the suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. *Warth*, 422 U.S. at 511 (citation omitted). Two years later, the Supreme Court articulated the test that must be met in order for an association to have standing to sue on behalf of its members: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington Apply Advertising Comm'n*, 432 U S. 333, 343 (1977).

In concluding RCPA lacked associational standing in March 1992, this court held that RCPA failed the third prong of the *Hunt* test because the claims RCPA alleged would require the participation and testimony of individual RCPA members. This court thus denied RCPA associational standing without deciding whether RCPA met the two other prongs of the *Hunt* test.

On appeal, the Seventh Circuit rejected this court's narrow construction of the third prong of the *Hunt* test. Instead, the Circuit adopted the less stringent interpretation of the third prong of the *Hunt* test articulated by the Third Circuit in *Hospital Council of Western Pennsylvania v. City of Pittsburgh*, 949 F.2d 83 (3d Cir.1991). In

Hospital Council, the Third Circuit found that "an association may assert a claim that requires participation by some members." *RCPA*, 7 F.3d at 601 (emphasis added by Seventh Circuit). The Third Circuit reasoned that the third prong of the *Hunt* test appears to paraphrase the Supreme Court's earlier statement in *Warth* that associational standing is proper "so long as the nature of the claim and the relief sought does not make individual participation of each injured party indispensable." *Id.*, citing *Warth*, 422 U.S. at 511 (emphasis added by Seventh Circuit). Thus, the Third Circuit concluded—and the Seventh Circuit agreed—that participation by some association members does not run afoul of the third prong of the *Hunt* test. *Id.* at 601-02.

Thus, this court must determine whether RCPA has associational standing in light of the Seventh Circuit's analysis of the issue. The burden is on RCPA to show that it meets the requirements for federal jurisdiction; "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth*, 422 U.S. at 518.

RCPA's conclusory arguments fail to provide the factual basis for establishing associational standing for two reasons. First, RCPA's ability to adequately litigate this suit is undermined by its lack of resources, experience, and authority from its membership. Second, profound conflicts between RCPA and its members undermine RCPA's ability to fulfill the *Hunt* test.

1. Ability To Adequately Litigate This Case

The Seventh Circuit directed this court to begin its analysis with "the pronouncement in *Brock*." *RCPA*, 7

F.3d at 607. The *Brock* pronouncement to which the Circuit refers is: [W]hile an organization might prove an inadequate representative in some instances to vindicate the rights of its members because of lack of resources and experience or because it lacks the appropriate authority from its membership, it will more often present a particularly efficient vehicle for litigation and the perspective of the judicial system. . . . [W]hile a class action creates an ad hoc union of injured plaintiffs whose only common link may be their common claims, a preexisting organization can often draw upon a preexisting reservoir of experience, research, and capital. These resources . . . can often sharpen the presentation of issues appreciably—one of the primary concerns of the doctrine of standing. *RCPA*, 7 F.3d at 600, citing *Brock*, 477 U.S. at 289. The Circuit further directed this court: In determining whether representational standing is appropriate with respect to any of the counts in the complaint, the court must evaluate the specific circumstances of this case in light of the characteristics of preexisting groups in the conduct of litigation set forth in *Brock*. It must determine whether those characteristics sufficiently outweigh whatever deficiencies it identifies in the RCPA for purposes of standing. *RCPA*, 7 F.3d at 607.

Thus, this court must make a threshold finding that RCPA's resources, experience and the authority of its members outweigh deficiencies to its associational standing. However, the facts do not support such a finding. RCPA does not show that its status as an organization endows it with any special expertise in maintaining this suit or that it has the resources to maintain this litigation. RCPA is not a research institution. RCPA has not performed research on the cost and availability of health

care coverage for its members because it does not have the time or money. City Defendants' Mem., Exh. B, John C. Pierce Dep. at 109-10. The only information about RCPA's resources is provided by the city defendants, who submit the minutes of the January 27, 1991 RCPA board meeting. City Defendants' Mem., Exh. D, minutes of 1/27/91 RCPA board meeting. At that meeting, RCPA treasurer Len Banasiak reported that, as of December 31, 1990, RCPA had "$73,702.99 in CDs, plus a total of $6,803.36 interest from CDs and checking account received in 1990." *Id.*

Finally, RCPA does not show that it has the support of its members in bringing this suit. RCPA submits no information about the number of its members, or the percent of its membership that support this litigation. The minutes of the January 27, 1991 RCPA board meeting provide the only indications of RCPA's membership. RCPA treasurer Len Banasiak reported that: "As of January 22, 1991, we have 3,129 paid members and approximately 300 more to be processed as of January 27, 1991." City Defendants' Mem., Exh. D, minutes of 1/27/91 RCPA board meeting. There is no indication of how many members support RCPA's position in this litigation or how the decision to support RCPA's position was made.

RCPA fails to meet the threshold requirements outlined by the Seventh Circuit for showing that the benefits of its bringing this suit outweigh the deficiencies of associational standing. RCPA has not shown that it has "a preexisting reservoir of experience, research, and capital" to draw upon. *See Brock*, 477 U.S. at 289. There is no evidence associational standing will sharpen the presentation of issues. *See RCPA*, 7 F.3d at 600. Thus, associational standing is not appropriate.

2. The *Hunt* test

Even assuming, arguendo, that RCPA meets the threshold requirements for associational standing, RCPA fails to meet the *Hunt* test. RCPA asserts that it meets the three requirements of the *Hunt* test in the following way: (1) individual standing of members ("Its members would otherwise have standing to sue in their own right" [this is not disputed]); (2) interests germane to organization's purpose (the interests it seeks to protect are germane to the organization's purpose [this, too, is not seriously contested, since the RCPA's purpose for over 100 years has been to unite the retirees and protect their benefits, and this has not been challenged either]; and, finally, (3) proof does not require participation of [all] members. RCPA's Mem. at 4. RCPA's conclusory assertions are insufficient to establish that the three prongs of the *Hunt* test are satisfied.

Most importantly, RCPA fails to adequately address the conflicts between it and its members that affect the second and third prongs.[2] RCPA merely claims all its members were hurt by the *Korshak* settlement except widows, because health care insurance costs increased for all its members except widows. RCPA Mem. at 6-7. RCPA entirely fails to address the serious conflict between members who retired on or before December 31,

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[2] The police fund disputes the first prong, claiming that RCPA has made no showing that its members have suffered actual injury to warrant individual standing. *See New York State Club Ass'n v. City of New York*, 487 U.S. 1, 8-10 (1988). Since the more persuasive arguments concern prongs two and three, the court assumes that RCPA members who retired after December 31, 1987 but before August 23, 1989 would have standing to sue in their own right.

1987 (the *Korshak* class) or on or after August 23, 1989 (the retirees covered by the legislation enacted pursuant to the *Korshak* settlement) and members who RCPA purports to represent in this suit (police officers who retired after December 31, 1987 but before August 23, 1989).

The Seventh Circuit, anticipating that conflicts of interest would be the crucial question on remand, determined the proper test for conflicts of interest. *RCPA*, 7 F.3d at 603-07. The Circuit noted that some courts have held that a conflict of interest among group members is not relevant to whether associational standing should be permitted; associational standing may be proper even when all members do not agree with the association's position. *RCPA*, 7 F.3d at 603-05, citing *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401, 1408-09 (9th Cir.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1670 (1992); *Hospital Council*, 949 F.2d at 88-89, citing *Contractors Ass'n v. City of Philadelphia*, 945 F.2d 1260, 1266 (3d Cir.1991); *National Maritime Union of America v. Commander, Military Sealift Command*, 824 F.2d 1228, 1232-33 (D.C.Cir.1987). However, the Circuit also pointed out that some courts have found that serious conflict among members of an organization or between members and the organization's leadership causes an organization to fail the *Hunt* test. *RCPA*, 7 F.3d at 605-07, citing *Maryland Highway Contractors Ass'n v. Maryland*, 933 F.2d 1246 (4th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 373 (1991); *Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374 (1987).

The first set of cases stand for the proposition that associational standing should not be denied when the lack of unanimity may be solved by remedies such as

denying issue preclusion against group members not adequately represented, allowing dissenting members to intervene in the suit to advance their own causes, or allowing dissenting members to challenge the association's standing if the association did not adhere to its internal procedures for adopting a position. The second set of cases stand for the proposition that when there is profound conflict of interest among the members of an organization, associational standing is not proper. The question is whether the conflicts between RCPA and its members or among its members are amenable to remedies short of denying associational standing or are so profound that associational standing must be denied.

The conflict between RCPA's position and the interests of a significant number of its members is profound. First, RCPA provides no information about: the number of its members who support its position, the process by which RCPA determined its position, or whether this process was consistent with RCPA's internal procedures. The percent of RCPA members who retired between December 31, 1987 and August 23, 1989 is extremely unlikely to be a majority; in fact, the percent is likely small. There are no indications about how RCPA decided to take the position it has or whether the total RCPA membership approves of this position. In fact, Richard Jones, once a trustee of the police fund and now an elected RCPA officer, voted to approve the *Korshak* settlement that RCPA now seeks to challenge. City Defendants' Mem., Exh. F, Richard Jones Dep. at 5-7. Thus, RCPA seeks to bring a suit to contest a decision supported by its own leadership.

The city defendants and the police fund point out that challenging the *Korshak* settlement may worsen the situ-

ation of those retired police officers covered by the settlement. Whereas RCPA focuses on the fact that all its members' health insurance rates have increased (except for widows), the city defendants and police fund point out that the rates could have increased significantly more. The *Korshak* class and retirees covered by the *Korshak* legislation are paying more for health insurance than in pre-*Korshak* days but less than if there were no city or pension fund subsidies. It appears that a majority of RCPA members are at risk in RCPA's litigation. If RCPA were successful in invalidating the *Korshak* settlement, the *Korshak* class and city employees who retired after August 23, 1989 could be forced to pay much higher health insurance premiums than they are now. RCPA members admit that the *Korshak* settlement benefited retirees other than widows. City Defendants' Mem., Exh. B, John C. Pierce Dep. at 111-13; Exh. E, Patrick J. Boyle Dep. at 84-86.

Profound conflicts cause an organization to fail the second prong of the *Hunt* test, the germaneness prong. *RCPA*, 7 F.3d at 606-07. As the Circuit Court for the District of Columbia has noted, "the germaneness test simply requires that 'an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together.' " *Id.* at 607, citing *Humane Society v. Hodel*, 840 F.2d 45, 56 (D.C.Cir.1988). An association fails the germaneness test when it's position is not consistent with its organizational goals. *Id.*

RCPA is an Illinois not-for-profit corporation whose aim is "to promote fellowship among former associates, protect them and the loved ones of deceased police officers who have passed on to another world from which no traveller ever returned." City Defendants' Mem., Exh. C,

RCPA's constitution and by-laws at 1. RCPA's constitution lists its object as "to unite as a corporate body all retired Chicago Police of every rank; the widows/widowers and dependents of all deceased police; and to protect funds in and under control of the Policemen's Annuity and Benefit Fund." *Id.* at 4. RCPA's stated objective of protecting all retired Chicago police officers and their survivors and dependents would be compromised by bringing a suit that may benefit some members but risks hurting even more.

In addition, profound conflicts cause an organization to fail the third prong of the *Hunt* , the individual participation prong, because there is not complete identity between the interests of the organization and its members. *See New York State Club Ass'n v. City of New York*, 487 U.S. 1, 10 n. 4 (1988). Associational standing is inappropriate "when conflicts of interest among the members of the association require that the members join the suit individually in order to protect their own interests." *Maryland Highways Contractors Ass'n*, 933 F.2d at 1252. Although the Seventh Circuit specifically held that testimony and participation by some association members does not violate the third prong of the *Hunt* test, *RCPA*, 7 F.3d at 601-02, the testimony of annuitants here would not be in complete identity with the interests of RCPA as a whole or with the interests of other RCPA members.

Since RCPA fails to show that it possesses the resources or experience to bring this suit or has the authority of its members to do so, associational standing is inappropriate. In addition, profound conflicts between RCPA's position and the interests of a majority of its members cause RCPA to fail the *Hunt* test. RCPA lacks associational standing to bring this case.

CONCLUSION

Plaintiff Retired Chicago Police Association lacks associational standing to maintain this action. Accordingly, this case is dismissed.

RETIRED CHICAGO POLICE ASSOCIATION,
Plaintiff,

v.

The CITY OF CHICAGO, et al., Defendants.

No. 90 C 407.

United States District Court,
N.D. Illinois, Eastern Division.

June 2, 1994.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

In this case involving the health care costs of retired Chicago police officers, plaintiff Retired Chicago Police Association ("RCPA") sued defendants the City of Chicago, three city officials, and four city employee pension funds: the Policemen's Annuity and Benefit Fund, the Firemen's Annuity and Benefit Fund, Municipal Employees' Annuity and Benefit Fund and the Laborers' and Retirement Board Employees' Annuity and Benefit Fund. On April 26, 1994, this court addressed the single remaining issue in this procedurally complicated and extremely contentious case: whether RCPA has associational standing. This court found that RCPA lacks associational standing to maintain this action and dismissed the case. RCPA requests reconsideration of the dismissal for lack of associational standing.[1]

Although RCPA neglects to cite a specific Federal Rule of Civil Procedure as the basis for its motion, the court

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[1] The court treats RCPA's "request" as a motion.

treats RCPA's motion as a Rule 59(e) motion to alter or amend the judgment because it was filed within ten days of the entry of the judgment dismissing the case. *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir.1986) (holding that "all substantive motions served within 10 days of the entry of judgment will be treated as based on Rule 59"); see also *Lawshe v. Simpson*, 16 F.3d 1475, 1477 n. 1 (7th Cir.1994). A motion to amend or set aside the judgment pursuant to Rule 59(e) may only be granted when the moving party clearly establishes either a manifest error of law or fact or presents newly discovered evidence that could not have been discovered previously. *See, e.g., Souter v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 72*, 993 F.2d 595, 599 (7th Cir.1993) (citation omitted); *Deutsch v. Burlington Northern R.R. Co.*, 983 F.2d 741, 744 (7th Cir.1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1845 (1993) (citation omitted).

In its April 26, 1994 decision, this court found associational standing improper because (1) RCPA's lack of resources, experience, and authority from its membership undermined its ability to adequately litigate this suit and (2) profound conflicts between RCPA and its members undermined RCPA's ability to fulfill the *Hunt* test. For whatever reason, RCPA spends the first five pages of its motion for reconsideration reviewing the substance of its complaint. RCPA's arguments on the merits of its claims are irrelevant to the issue of its associational standing. Whether or not RCPA's claims are meritorious is beside the point; the issue at hand is whether RCPA has standing to bring the claims.

RCPA eventually addresses the two issues for potential reconsideration: (1) whether it has the ability to ade-

quately litigate this case; and (2) whether there are profound conflicts of interest between it and its members. However, RCPA does not meet its burden; RCPA fails to establish a manifest error of law or fact or to present newly-discovered evidence. Thus, RCPA is not entitled to relief pursuant to Rule 59(e).

First, RCPA does not establish any manifest error of law. RCPA claims that this court has improperly imposed a "wealthy organization burden" on it by holding that RCPA must be endowed with special expertise or resources to maintain the litigation. However, this court merely followed the explicit instruction from the Seventh Circuit to assess RCPA's associational standing and used the analysis of *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274 (1986). *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 599-607 (7th Cir. 1993). RCPA need not be wealthy to meet the *Brock* requirements; it simply must have sufficient resources to litigate the action. RCPA also need not be a major research center to meet the *Brock* requirements; but RCPA must have some particular expertise that qualifies it to represent the interests of its members. RCPA's argument that "only associations, like this plaintiff, are likely to be brave enough to file these actions" is inapposite. *See* Mot. at 6. Bravery is not tantamount to expertise, nor has the Supreme Court or the Seventh Circuit identified bravery as a consideration in determining associational standing.

Second, RCPA does not present any newly-discovered evidence. RCPA challenges this court's conclusions that it lacks the ability to adequately litigate this case and that there are profound conflicts of interest between it and its members. However, the 1991 deposition testimo-

ny RCPA relies on was available to RCPA when it filed its brief in support of associational standing on March 18, 1994.[2]

Third, even taking RCPA's improperly submitted evidence into account, RCPA does not establish any manifest error of fact. Regarding RCPA's ability to litigate this suit, RCPA asserts that "[t]he conclusion that the Association does not have the unified support of its members in bringing this suit is wrong." Mot. at 5. In support of this allegation, RCPA states that: (1) 6,000 of its 9,000 members participate in the retiree health care plans; (2) RCPA received thousands of affidavits opposing the *Korshak* settlement; and (3) RCPA's decision to litigate was made at a regular meeting of RCPA's trustees and directors. *Id.* at 5-6. RCPA relies on deposition testimony by RCPA President John Pierce ("Pierce") to buttress these assertions. Pierce's cited deposition testimony is insufficient to establish a manifest error of fact.

Specifically, Pierce does not testify, either on pages 43-48 of his December 5, 1991 deposition[3] or on pages 43-48

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[2] The court notes that RCPA had three months to prepare its initial submission. In its January 18, 1994 decision regarding sanctions, this court set a briefing schedule for the remanded associational standing issue; RCPA's brief in support of associational standing was originally due on February 22, 1994. *Memorandum Opinion and Order*, 90 C 407 (N.D.Ill. Jan. 18, 1994). However, this court granted RCPA's two requests for extensions, so RCPA's brief was not actually due until March 16, 1994. *See Order*, 90 C 407 (N.D.Ill. Mar. 1, 1994); *Order*, 90 C 407 (N.D.Ill Mar. 15, 1994). Nevertheless, RCPA filed its brief two days late on March 18, 1994.

[3] Pierce was deposed on December 5, 1991 and October 17, 1991. In its request for reconsideration, RCPA refers to

(continued...)

of his October 17, 1991 deposition, that 6,000 of the 9,000 RCPA members participate in the retiree health care plans. Mot., Exhs. A & B. RCPA claims that pages 123-28 of Pierce's December 4, 1991 support its assertion that RCPA received thousands of affidavits opposing the *Korshak* settlement. However, Pierce's December 5, 1991 deposition ends on page 124, and pages 123-28 of Pierce's October 17, 1991 deposition do not discuss affidavits opposing the *Korshak* settlement. *Id.*, Exhs. A & B. Finally, Pierce states in his October 17, 1991 deposition that the decision to file this lawsuit was made by RCPA's board of trustees and approved by the majority of RCPA members at the next full membership meeting. Mot., Exh. A, October 17, 1991 deposition at 158-59. However, Pierce admits that full membership approval was by a show of hands, and he does not recall when that meeting was or how many members were present. *Id.* at 159-60. This testimony is insufficient to establish that the majority of RCPA members support RCPA's litigation.

RCPA also asserts that there are no conflicts among its members. Mot. at 6. In support of this assertion, RCPA again relies on 1991 deposition testimony by Pierce as well as RCPA Secretary Richard Jones ("Jones"). Again, RCPA's purported evidence is insufficient to establish a manifest error of fact. RCPA fails to show the absence of profound conflicts among RCPA members.

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[3] (...continued)
Pierce's December 4, 1991 deposition; the court assumes RCPA intends to refer to Pierce's December 5, 1991 deposition and has directed its attention to the relevant pages in Pierce's December 5, 1991 deposition.

For the proposition that RCPA received thousands of letters and affidavits complaining about the *Korshak* settlement, RCPA again refers to pages 123-28 of Pierce's December 4, 1991 deposition, as it did unsuccessfully above. RCPA refers to "attached deposition extracts from Pierce's October 17, 1991 deposition" to support its claim that RCPA's trustees and members unanimously support the decision to bring this suit. Mot. at 5. Attached to the motion are pages 158-60, 165, 186-88 of Pierce's October 17, 1991 deposition. These extracts, the first of which has already been discussed above, do not establish unanimous RCPA member support for this suit. Finally, RCPA's reliance on Jones' testimony that he disagrees with some aspects of RCPA's complaint to argue that Jones essentially agreed with RCPA's suit is misplaced. Mot., Exh. C, Jones' December 5, 1991 deposition at 8-11.

Even if this information was not precluded because it is not newly discovered, RCPA would still patently fail to establish the absence of conflicts between itself and its members. RCPA's statement that "[t]here is no indication that any members have opposed its position in any way" misses the point. *See* Mot. at 7. RCPA appears to overlook the fact that it bears the burden of establishing associational standing. *See Warth v. Seldin*, 422 U.S. 490, 518 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."). It is RCPA's responsibility to show that its members support its position. RCPA still has provided no information about the number of its members who support its position, the process by which RCPA determined its position, or whether this process was consistent with RCPA's in-

ternal procedures. *See Memorandum Opinion and Order*, 90 C 407 (N.D.Ill. Apr. 26, 1994) at 13.

CONCLUSION

Plaintiff Retired Chicago Police Association's motion for reconsideration of this court's dismissal for lack of associational standing is denied.

No. 92-2314.
United States Court of Appeals
For the Seventh Circuit

RETIRED CHICAGO POLICE ASSOCIATION, an Illinois not-for-profit corporation, individually and on behalf of its members and other individuals who are participants in the City of Chicago's Annuitant Healthcare Plan, and whose participation began after 1987, but prior to August 23, 1989, Katherine Ryan, Bernard McKay, and Joseph Coglianese, for themselves and for others similarly situated as participants in the City of Chicago's Annuitant Healthcare Plan whose participation began prior to January 1, 1988, and the Retired Chicago Police Association, an Illinois not-for-profit corporation, individually and on behalf of its members and other individuals who are members of the 1987 class,

Plaintiffs-Appellants,

and

Thomas J. Ahlfeld, Ignazio Bontempo, Patrick J. Boyle, Donald M. Jacobson, Michael Monaghan, Arthur Papineau, Lawrence J. Thomas, Bob Valleyfield, William L. Tlapa, Stanley C. Lis, Benedict J. Scacchiti, Arthur T. Cholly, William Danaher, and the Coalition of Active and Retired Employees Political Action Committee, also known as C.A.R.E.P.A.C.,

Appellants,

v.

CITY OF CHICAGO, a municipal corporation; Richard M. Daley, Mayor of the City of Chicago; Miriam Santos, Treasurer of the City of Chicago; Walter Knorr, Comptroller of the City of Chicago; the Policemen's Annuity and Benefit Fund of Chicago; the Firemen's Annuity and

Benefit Fund of Chicago; the Municipal Employees' Annuity and Benefit Fund of Chicago; and the Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago,

Defendants-Appellees.

Argued April 6, 1993.
Decided Oct. 12, 1993.

Before RIPPLE and MANION, Circuit Judges, and ENGEL, Senior Circuit Judge.*

RIPPLE, Circuit Judge.

This case arises from the dissatisfaction of some City of Chicago employees with a settlement agreement reached in state court regarding a dispute over the terms of a health care plan offered by the City. Because the *Retired Chicago Police Association v. City of Chicago* action and the *Ryan v. City of Chicago* action are substantially similar, they were consolidated by the district court. The district court granted summary judgment against the Korshak plaintiffs on the basis of res judicata. It then denied the Retired Chicago Police Association's (RCPA) motions for preliminary injunction and for class certification, and subsequently dismissed RCPA's complaint for lack of associational standing.[1] The RCPA and its proposed class, the Korshak plaintiffs, and the potential intervenors all appeal the judgment of the dis-

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* The Honorable Albert J. Engel, of the Sixth Circuit Court of Appeals, is sitting by designation.

[1] Motions to intervene submitted by a group of individuals and a political action committee were also denied.

trict court. For the reasons that follow, we affirm in part and reverse and remand in part.

I

BACKGROUND

A. Early History of the City's Health Care Plan

This case has a lengthy and complex procedural history, both in the Illinois state courts and in the federal district court. We shall set forth only those facts necessary for resolution of this appeal. The four pension funds here at issue, the Policemen's Annuity and Benefit Fund, the Firemen's Annuity and Benefit Fund, the Municipal Employees' Annuity and Benefit Fund, and the Laborers' and Retirement Board Employees' Annuity and Benefit Fund (the Funds) were organized under the authority of the state pension code to provide for and administer pension benefits for certain retired city employees. Since the early part of the last decade, the Funds' annuitants participated in the City's health care plan. This plan made health care coverage available for retired employees. In 1982, the City, as it had been doing periodically, increased the premium rates charged to annuitants and set a fixed premium for coverage. The state of Illinois then enacted legislation to address specifically annuitants' health benefits coverage. The legislation required the Police and Firemen's Funds to purchase group health insurance for their beneficiaries and required the City to subsidize partially the costs of annuitant health care coverage. According to the City, any premium not covered by the City's subsidy had to be paid by the indi-

vidual annuitants.[2] The legislation further required the City to levy a special tax to raise sufficient revenue to cover the Funds' new mandatory monthly contributions. At the time of the enactment of the legislation, the subsidies from the City to the Funds covered the entire monthly premium charged under the City's plan. However, during the ensuing years, the costs of health care spiraled upward. The Funds did not make contributions out of the annuitants' benefits. Consequently, as the 1982 premiums began to cover decreasing percentages of the total cost of annuitant coverage, the City has shouldered an ever-increasing share of total annuitant health care costs with additional subsidies.

B. The State Litigation

In 1987, the City brought suit against the Funds in state court. It sought a judgment permitting it to terminate annuitant health care coverage under its plan and declaring that it had no obligation to subsidize coverage. It also sought to recover the money it had already expended on health care benefits. *See City of Chicago v. Korshak*, Circuit Court of Cook County, Chancery Div. No. 87 CH 10134. The Trustees of the Funds counterclaimed and filed a motion for an injunction to bar the City's threatened termination of health care coverage.

A group of annuitants then moved to intervene in the litigation. They sought to protect the interests of the individual annuitants who participated in the City's plan by requiring that the plan be maintained as previously

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[2] In 1985, similar legislation was enacted with respect to the Municipal Employees' Fund and the Laborers' Fund.

set by the City. On May 5, 1988, the state court granted their motion to intervene and designated these intervenors as representatives for a certified class of annuitants who had retired on or before December 31, 1987 (the 1987 or *Korshak* class). The RCPA also moved for intervention and class certification, but both of those motions were denied.

On May 16, 1988, the court dismissed the City's complaint, but proceeded to conduct a bench trial on the Funds' counterclaims. Before the court issued its ruling, however, the City and the Funds reached a settlement agreement in which they agreed to co-sponsor legislation that would change the Illinois Pension Code. The resulting legislation increased the amount that the Funds would contribute to the health care premium of each annuitant. It also required the City to continue to provide health care coverage through 1997 by paying at least fifty percent of the cost, an obligation that would continue to be funded by a special tax. Annuitants would be responsible for paying any costs remaining after all contributions and subsidies had been paid. If no new agreement was reached by the expiration of this legislation, the plan would return to its pre-settlement terms.

After the legislation allowing the pension changes was enacted, the state court conducted a fairness hearing in regard to the terms of the settlement agreement. At the hearing, several class members testified against the settlement and none spoke in favor of it. The annuitant-intervenors were not pleased with the terms of the settlement; their goal had been to prohibit the City from changing the terms of the health care plan for existing participants and from thereby raising the costs to each annuitant. Over these objections, the court approved the

settlement agreement. The 1987 class then filed an appeal.

C. The Present Action

While the appeal was pending in the Illinois courts, the RCPA filed a class action (the RCPA claim) against the City, several city officials, and the Funds in federal district court. The proposed class comprised: "all annuitants of the City of Chicago Police, Fire, Municipal and Laborers' Pension Funds and their spouses, survivors and dependents who are current participants in the City's Annuitant Healthcare Plan" and whose participation began after December 31, 1987 (the end date of the *Korshak* class) and prior to August 23, 1989 (the date on which the *Korshak* legislation, described above, was enacted). R. 1 at 3-4. The proposed RCPA class, therefore, had not been included in the class certified for the *Korshak* settlement.

In its complaint, the RCPA alleged that the City and the Funds had violated 42 U.S.C. § 1983 (1988) by abrogating annuitants' rights secured under the Contract Clause and the Fourteenth Amendment of the United States Constitution. In essence, the plaintiffs alleged that the settlement agreement stemming from the state litigation altered the terms of the City's health plan and the related obligations of the City and the Funds in violation of the Contract Clause, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The RCPA also asserted state breach of contract and estoppel claims, as well as violations of the Illinois Constitution. The RCPA contended that the City had promised the annuitants they would have lifetime health

care coverage at unchanged rates. It further asserted that the Funds had advised annuitants that premium subsidies would be paid throughout an annuitant's retirement by his respective Fund, thus providing essentially free health care coverage for life. The annuitants would pay only for additional coverage for spouses and dependents. The RCPA alleged that these promises had been made to the annuitants in a variety of ways, through oral representations at retirement seminars, in a booklet prepared by the City to explain the benefits of its health care plan, and by word of mouth and general understanding. The RCPA sought declaratory and injunctive relief to bar the *Korshak* settlement from taking effect, to prohibit the City from changing the terms of annuitant health care costs under the plan, and to determine that the annuitants' premiums would be paid by the appropriate Fund. The district court stayed all proceedings until the state appeals in *Korshak* were resolved.[3]

In addition to the RCPA's request for class certification, ten individual retired city employees participating as annuitants in the Police Fund (the Ahlfeld group), filed a motion for intervention and class certification, adopted the allegations of the RCPA's complaint, and averred that their claims involved and relied upon the

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[3] The fairness of the settlement agreement was upheld in *City of Chicago v. Korshak*, 206 Ill.App.3d 968, 151 Ill.Dec. 797, 565 N.E.2d 68 (1990). The Illinois Supreme Court subsequently denied leave to appeal, *City of Chicago v. Korshak*, 139 Ill.2d 594, 159 Ill.Dec. 105, 575 N.E.2d 912 (1991), and the Supreme Court of the United States denied a petition for a writ of certiorari in *Ryan v. City of Chicago*, ___ U.S. ___, 112 S.Ct. 1291, 117 L.Ed.2d 515 (1992).

same facts and law. R. 49 at 1-2. The court also received a separate motion for intervention and class certification by the Coalition of Active and Retired Employees Political Action Committee (C.A.R.E.P.A.C.). R. 127.

The City and the Funds claimed that the *Korshak* proceedings barred the RCPA's claim on the ground of res judicata. The district court disagreed and on September 10, 1991, held that the 1988 proposed class was not barred by res judicata from continuing to pursue their claims.

On September 30, 1991, the Korshak class (or 1987 class) filed a separate complaint nearly identical to that which the RCPA had filed. R. 1, *Ryan v. City of Chicago*, No. 91 C 6200 (N.D.Ill.). This was the identical class that had intervened in *Korshak* and had participated in the settlement hearing. Due to the similarities of the complaints in *Korshak* and *RCPA* and the fact that the same attorney represented both proposed classes, the two cases were consolidated by the district court. Korshak R. 10.

In February 1990, the RCPA brought its first motion for a preliminary injunction to keep the City from changing the terms of the health care plan during the litigation. This motion was held in abeyance on assurances by the City that it would treat the post-1987 annuitants (the RCPA claimants) the same as the pre-1987 annuitants. Despite these assurances, in October 1991, the City decided to change the terms of the plan. The RCPA brought another motion for preliminary injunction. The district court denied the motion without explanation and the RCPA requested reconsideration. On November 12, the City reiterated its plans to change the terms of coverage. Again the RCPA filed a motion for preliminary injunction. The court apparently did not address this mo-

tion.[4] The City's new plan went into effect on January 1, 1992.

On January 6, 1992, the district court granted the City's motion for summary judgment with respect to the Korshak claims. The court found that the Korshak plaintiffs' claims were barred by res judicata due to the binding effect of the *Korshak* settlement. The district court then denied the RCPA's motion for class certification. The court held that the typicality and adequacy of representation requirements for class certification were lacking. The district court also denied the motions for intervention by the Ahlfeld group and C.A.R.E.P.A.C. This denial was based on procedural grounds: (1) the motions were not accompanied by a pleading setting forth the claims on which intervention was sought and (2) the motions improperly attempted to expand the scope of the class defined in the RCPA's complaint. The RCPA moved for reconsideration and stated that it would amend its complaint to comport with the expanded class definition. The court granted the motion to reconsider, but again denied the motions to intervene and to certify the classes. The district court held that the denial to intervene mooted the potential intervenors' motions for class certification, but, in the alternative, analyzed the merits of these claims for certification while addressing the RCPA's own certification motion, which the court also denied.

The district court then questioned the RCPA's standing to maintain the action in a representational capacity for

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[4] RCPA states that this motion was effectively denied on March 25, 1992, when the district court denied all pending motions by RCPA.

its members rather than as a class representative. The district court concluded that the organization had no standing to pursue the claim and dismissed the RCPA's complaint. In the court's view, the action required individual member participation and therefore found that associational standing was inappropriate.

Final judgment was entered for defendants on April 30, 1992. The RCPA, the putative intervenors, and the Korshak plaintiffs all appeal from that judgment.

II

ANALYSIS

A. Summary Judgment Based on Res Judicata and the *Korshak* Settlement

1. The Korshak class

To determine whether the *Korshak* settlement bars the Korshak claims, we must give a state court judgment the same effect that it would be given by that state. 28 U.S.C. § 1738 (1988).[5] "Congress has specifically required all federal courts to give preclusive effect to state-court

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[5] 28 U.S.C. § 1738 states in pertinent part: The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

judgments whenever the courts of the State from which the judgments emerged would do so. . . ." *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980); see also *Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1396 (7th Cir.1992) (stating that federal courts must apply the preclusion rules of the state from which the judgment arose); *Greening v. Moran*, 953 F.2d 301, 305 (7th Cir.) (stating same), cert. denied, ___ U.S. ___, 113 S.Ct. 77, 121 L.Ed.2d 42 (1992). To assess the preclusive effect of an Illinois state court judgment, therefore, we must apply that state's res judicata requirements. Under Illinois law, an action is barred by res judicata when there exists: "(1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies." *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill.2d 285, 176 Ill.Dec. 874, 879, 602 N.E.2d 820, 825 (1992); see also *Welch v. Johnson*, 907 F.2d 714, 720 (7th Cir.1990) (stating same). The district court determined that all three of these elements were satisfied in regard to the proposed Korshak class. Thus, it held that, with respect to the Korshak claims, the class action was barred by the settlement in *Korshak*, and entered judgment for the City and the Funds.

The Korshak annuitants contend that the district court improperly granted summary judgment against them on the basis of res judicata. While they concede that the proposed class was a party to *Korshak* because the state court granted them intervention in the action, they submit that the other two required elements of res judicata are not fulfilled. First, the Korshak plaintiffs contend that no identity of cause of action exists between *Korshak* and the present litigation because the proposed

class alleges constitutional violations which it did not allege in the previous action. The Korshak claimants also note that they now allege a breach of fiduciary duty by the Fund Trustees when they agreed to the *Korshak* settlement. They contend that these claims could not have been asserted in that litigation. The Korshak plaintiffs also contend that *Korshak* was a suit over promises that the City made to the Funds regarding payment of subsidies; here, on the other hand, they state that they are basing their claims on promises that the City made directly to the annuitants. This variance, they submit, gives rise to a different cause of action. Second, the Korshak plaintiffs assert that no final judgment on the merits of the 1987 class' claims was ever rendered in *Korshak*. They contend that no decision on the merits was entered by the state court because the court merely approved a settlement between the City and the Funds.

a. identity of cause of action

The Illinois Supreme Court has stated that, " '[i]f the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted and res judicata bars the latter action.' " *Progressive Land Developers*, 176 Ill.Dec. at 879, 602 N.E.2d at 825 (quoting *Morris v. Union Oil Co.*, 96 Ill.App.3d 148, 51 Ill.Dec. 770, 421 N.E.2d 278 (1981)); see also *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 243 Ill.App.3d 544, 183 Ill.Dec. 673, 678, 611 N.E.2d 1321, 1326 (1993) (stating that if same facts or evidence are essential to both proceedings, then identity of causes of action exists between them). The court also noted that, while one group of facts can be the basis

for numerous theories of recovery, there remains only a single cause of action. *Progressive Land Developers*, 176 Ill.Dec. at 879, 602 N.E.2d at 825.

We agree with the district court that the Korshak cause of action arises from the same factual basis as *Korshak*. The same facts form the foundation of both claims, and the same evidence is essential to the resolution of both. Variance in the theory of recovery cannot turn the claim into a different cause of action. Both *Korshak* and Korshak involve the City's alleged obligation to pay for health care and both claims sought to maintain the 1982 level of payments and subsidies. Moreover, we also note that Illinois res judicata law bars not only those issues actually raised in the first action, but also those that could have been raised in the proceeding. *Greening*, 953 F.2d at 305 (setting forth Illinois law); *Redfern v. Sullivan*, 111 Ill.App.3d 372, 67 Ill.Dec. 166, 169, 444 N.E.2d 205, 208 (1983). All of the issues that the Korshak plaintiffs attempt to raise in this litigation could have been raised in the earlier litigation. See *Welch*, 907 F.2d at 720; *LaSalle Nat'l Bank of Chicago v. County of DuPage*, 856 F.2d 925, 930-31 (7th Cir.1988), cert. denied, 489 U.S. 1081, 109 S.Ct. 1536, 103 L.Ed.2d 840 (1989).[6] Ac-

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[6] The Ryan plaintiffs also argue that, because they objected to the *Korshak* settlement, they should not be bound by it. Our review is limited to determining whether the elements of Illinois res judicata law have been satisfied. The 1987 class exhausted its direct appeals from the settlement order and the binding effect of that action would have been better addressed in those appeals. To the extent plaintiffs are questioning whether the prior state court proceeding met minimum due process requirements, we note that the state trial court allowed them to present their views at the settlement hearing,

(continued...)

cordingly, the district court correctly held that, under Illinois law, an identity of causes of action exists between *Korshak* and Korshak.

b. final judgment on the merits

We also agree with the district court that a final judgment on the merits was reached in *Korshak*. Despite the intervenors' objections in *Korshak*, the state court found the settlement agreement fair and entered an order approving the settlement and dismissing all claims with prejudice. R. 32 at Appendix C. "Dismissal with prejudice is deemed to be as conclusive of the rights of the parties as if the matter had proceeded to trial and had been resolved by final judgment adverse to the plaintiff." *Morris v. Union Oil Co.*, 96 Ill.App.3d 148, 51 Ill.Dec. 770, 776, 421 N.E.2d 278, 284 (1981); see also *McLain v. West Suburban Hosp. Medical Ctr.*, 208 Ill.App.3d 613, 153 Ill.Dec. 574, 576, 567 N.E.2d 532, 534 (1990) (stating that settlement and dismissal of claim with prejudice was an adjudication on the merits); *Gillilan v. Trustees for Cent. States, Southeast and Southwest Areas Pension Fund*, 183 Ill.App.3d 306, 131 Ill.Dec. 950, 957, 539 N.E.2d 303, 310 (1989) (stating that "dismissal with prejudice entered pursuant to a settlement agreement constitutes a final judgment on the merits sufficient for application of res judicata"). Because all three elements required for preclusion under Illinois law have been satisfied, summary judgment was properly entered for the City and the Funds on the Korshak claims.

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[6] (...continued)
and the fairness of the settlement was upheld on the plaintiffs' state court appeal.

2. The RCPA claims

The City and the Funds also moved for summary judgment against the RCPA based on the contention that the RCPA's claims should be barred by the res judicata effect of the *Korshak* agreement. The district court denied the motion. It held that an identity of parties or their privies had not been shown to exist between the *Korshak* proceedings and the RCPA claims. The RCPA had been denied intervention in the *Korshak* litigation. Moreover, the class it proposed to the district court here consisted only of annuitants who retired after December 31, 1987, the end date of the *Korshak* class. Thus, these annuitants had not been included as part of the intervening class in *Korshak*. After concluding that the RCPA had not been a party in *Korshak*, the district court then held that these plaintiffs had also not been in privity with a party to those proceedings; therefore, res judicata could not preclude the federal claims.[7]

The City and the Funds now advance the argument that the RCPA is in privity with the Funds which were parties to the *Korshak* agreement.[8] In short, the City ac-

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[7] Because the other two elements of res judicata under Illinois law—finality of judgment and identity of cause of action—are satisfied, RCPA's federal action is precluded if privity does exist.

[8] Although the district court rejected this argument, the City and the Funds need not file a cross-appeal to raise it again in this court. As the prevailing parties in the district court, the City and the Funds may advance, in support of the judgment, all arguments they presented to that court. They need not "file a cross-appeal just because the district judge rejected one of [their] arguments on the way to deciding in [their] favor." *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 672 (7th Cir.) (cit-

(continued...)

knowledges that the proposed RCPA class was not a party to *Korshak*, but contends that the RCPA and its members, as beneficiaries of the Funds, were in privity with the Funds and their Trustees who were indeed parties to the state court proceedings. Additionally, the Funds assert that the involvement of the 1987 class (also members of the RCPA) as intervenors in *Korshak*, the involvement of the president of the RCPA who was allowed to testify at the fairness hearing in his individual capacity, and the fact that counsel in both *Korshak* and RCPA was the same person demonstrate that the interests of the proposed RCPA class were represented adequately in *Korshak*, thus creating an identity of parties.

For purposes of res judicata, the Illinois Supreme Court has stated that privity exists "between parties who adequately represent the same legal interests . . . [and it] is the identity of interest that controls in determining privity, not the nominal identity of the parties." *Progressive Land Developers*, 176 Ill.Dec. at 879-80, 602 N.E.2d at 825-26 (citations omitted); *see also Singer v. Brookman*, 217 Ill.App.3d 870, 160 Ill.Dec. 822, 824-25, 578 N.E.2d 1, 3-4 (1991) (stating that for parties to be in privity with one another for purposes of res judicata, they must have "the same legal rights or interests"). Adequate representation of the same legal interests necessarily entails the absence of conflicts of interest between

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[8] (...continued)
ing *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 96 S.Ct. 2158, 48 L.Ed.2d 784 (1976)), *cert. denied*, ___ U.S. ___, 113 S.Ct. 68, 121 L.Ed.2d 34 (1992). The City and the Funds are, therefore, allowed to propound an alternative ground for affirmance that the district court ignored or rejected. *See Abbs v. Sullivan*, 963 F.2d 918, 925 (7th Cir.1992).

the party in the prior action and that in the subsequent action. *See Hartigan*, 183 Ill.Dec. at 678, 611 N.E.2d at 1326. As the City contends, trustees and their beneficiaries may often be in privity with each other. Nevertheless, such a relationship should not be assumed. Beneficiaries not made a party to a legal action may be bound by their trustees' participation only when the beneficiaries' interests are properly represented. Those interests must receive actual and efficient protection by the trustees' participation.[9] These principles are merely corollaries of the general proposition that privity exists only when the parties' legal interests are the same.

We agree with our colleague in the district court that the City and the Funds have not sufficiently demonstrated that the legal interests of the *Korshak* parties and the putative RCPA class were sufficiently similar to constitute adequate representation by the Funds' participation. As the district court noted, the pension funds were negotiating with the City for the continuation of a health care plan. However, the Funds also had an incentive to limit the extent of their own subsidies to the City's plan. R. 89, RCPA Mem.Op. at 12. This incentive created a potential conflict of interest with the annuitants.[10] Thus, be-

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[9] *See, e.g., In the Matter of Estate of Breault v. Breault*, 63 Ill. App.2d 246, 211 N.E.2d 424, 437-38 (1965) (stating that beneficiary is bound by suit in which trustee was a party and rendered actual and efficient protection of beneficiary's interests); *Anderson v. Elliott*, 1 Ill.App.2d 448, 117 N.E.2d 876, 879 (1954) (holding that where trustee provides actual and efficient protection of beneficiary's interests, beneficiary is not a necessary party to the suit).

[10] Certainly the state court must have entertained some concern with the Funds' ability to represent annuitants in the

(continued...)

cause the RCPA plaintiffs were not in privity with the litigants in the prior *Korshak* action, we agree with the district court that the *Korshak* settlement has no res judicata effect against the RCPA's subsequent claims.

B. Denial of Motions to Intervene[11]

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[10] (...continued)
Korshak settlement proceedings because it allowed the pre-1988 annuitants to intervene as a class and thus to take part in the fairness hearing.

[11] Although no party raises the issue, we have examined whether this court has jurisdiction to review the decision of the district court not to entertain the defective motions to intervene. We note that the district court denied both the C.A.R.E.P.A.C. and Ahlfeld group's motions to intervene in an order dated March 23, 1992. Nevertheless, the putative intervenors did not file a notice of appeal until May 29, 1992, over two months later. "An order denying intervention is final and appealable. . . . By necessity such an order is subject to immediate review, because denial of intervention precludes the proposed intervenor's ability to appeal the later judgment (and at that time to challenge the earlier denial of intervention)." *B.H. v. Murphy*, 984 F.2d 196, 199 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2930, 124 L.Ed.2d 680 (1993). Movants denied intervention do not become parties. Thus, an appeal of a denial of a motion to intervene "must be filed within thirty days after the date of entry of the judgment or order appealed from." Id. (quoting Fed.R.App.P. 4(a)(1)). *See Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947); cf. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987) (a party denied intervention as a matter of right but allowed permissive intervention may not appeal denial of intervention as of right because, as a party, he may appeal upon the rendition of a final judgment). In *Shores v. Sklar*, 844 F.2d 1485, 1491 (11th Cir.1988), reinstated in part, 885 F.2d 760, 761 (11th Cir.1989), *cert. denied*, 493 U.S. 1045, 110

(continued...)

The district court refused to grant either the motion to intervene submitted by C.A.R.E.P.A.C. or that of the Ahlfeld group because it determined that neither submission satisfied the procedural requirements for intervention set forth in Rule 24 of the Federal Rules of Civil Procedure. Rule 24(c) requires that "[t]he motion [to intervene] shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or

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[11] (...continued)
S.Ct. 843, 107 L.Ed.2d 838 (1990), the Eleventh Circuit held that an unnamed member of a putative class who moved to intervene as a named plaintiff could not wait until final judgment to appeal the denial of his motion; he was required to appeal the denial within thirty days of the entry of the order. Nevertheless, the particular circumstances of this case make it difficult o conclude that we are without jurisdiction to review this matter on appeal. After holding the motions to intervene inadequate, the district court immediately proceeded to discuss the merits of the motions for class certification filed by the putative intervenors. The district court took this step, "in anticipation of a belated motion by the intervenors to file procedurally correct motions." R. 271, Mem.Op. at 13. By choosing this course of proceeding, the district court appears to have expected that the putative intervenors would conform their motions to the court's ruling and therefore deserve a decision on the merits of their class certification request. Under these circumstances, we do not believe that it is compatible with the policy of finality that animates 28 U.S.C. § 1291 to hold that the ruling of the district court on the matter of intervention was a final judgment and that the putative intervenors were required to take an immediate appeal. *Cf. J.I. Case Credit Corp. v. First Nat'l Bank*, 991 F.2d 1272, 1275 (7th Cir.1993) (stating that dismissal without prejudice is generally not final and appealable); *Production and Maintenance Employees' Local 504*, 954 F.2d 1397, 1402 (7th Cir.1992) (stating same); *Ordower v. Feldman*, 826 F.2d 1569, 1572 (7th Cir.1987) (noting that "[i]f a district court's dismissal leaves a plaintiff free to file an amended complaint, the dismissal is not considered a final appealable order").

defense for which intervention is sought." Neither of the motions to intervene was accompanied by such a pleading.

The putative intervenors assert that they did indeed meet Rule 24(c)'s pleading requirement because each of their motions specifically adopted the allegations of the RCPA's complaint. They claim that adoption by incorporation is a valid method by which to meet the pleading requirement because, under Federal Rule of Civil Procedure 10(c), pleadings may be adopted by reference in other motions.[12] As we have held previously, however, the requirement of Rule 24(c) is unambiguous and, as a general rule, compliance may not be achieved simply by adopting the prior pleadings of a party. *Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir.1987). "The motion to intervene technically may not just 'adopt' the pleadings of an original party, nor may it merely describe a future pleading. . . ." *Id.* As the district court recognized, however, we do not take an inflexible view of this rule; if no prejudice would result, a district court has the discretion to accept a procedurally defective motion. *Id.*

Whether to permit a procedurally defective motion to intervene is within the sound discretion of the district court. In this instance, the district court refused to permit such a deviation from the requirement of the Rule. It noted that not only were the motions procedurally defective, but both motions to intervene attempted to redefine and significantly expand the scope of the class de-

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[12] The rule states in pertinent part: "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion." Fed.R. Civ.P. 10(c).

fined in the RCPA's complaint. The Ahlfeld group's motion sought intervention for plaintiffs whose benefits had vested prior to August 23, 1989. This clearly would have expanded the RCPA's proposed class which contained only those individuals who had retired and become participants prior to that date. The C.A.R.E.P.A.C. motion to intervene also sought to include all individuals who were either participating or whose benefits had vested prior to August 23, 1989. Again, the motion was an obvious expansion of the class sought by the RCPA in its complaint. These differences between the motions to intervene and the RCPA's complaint, were, in the view of the district court, too significant to allow waiver of Rule 24(c). Moreover, the district court noted that the City and the Funds had pointed out the procedural defects in the motions earlier in the litigation, but the putative intervenors had made no effort to rectify the deficiencies until their motions had been denied.[13] R. 271, Mem.Op. at 12. We cannot say that the district court abused its discretion when it refused to entertain both

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[13] Both C.A.R.E.P.A.C. and the Ahlfeld group contend that, after the court initially denied their motions to intervene, they stated that the RCPA would amend the complaint to conform to the district court's concerns. However, the court dismissed the motion to amend as moot after it dismissed the RCPA's complaint for lack of standing. Although the argument is somewhat unclear, the putative intervenors seem to assert that, because the RCPA was willing to amend its complaint, the district court should have permitted it to do so, and thus the court improperly denied their requests for intervention. Additionally, in their notice of appeal, appellants state that they appeal the denial of the motion to amend the RCPA's complaint. In their brief on appeal, however, they set forth neither arguments regarding why the denial was inappropriate nor why this court should reverse the district court's order. Thus, we shall not examine this issue.

C.A.R.E.P.A.C.'s and the Ahlfeld group's procedurally deficient motions for intervention.

C. Denial of Class Certification

The district court denied the motions of all three groups—the RCPA, C.A.R.E.P.A.C., and the Ahlfeld group—for class certification.[14] Under Federal Rule of Civil Procedure 23,[15] a district court has broad discretion to determine whether certification of a class is appropri-

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[14] As unsuccessful movants for intervention, C.A.R.E.P.A.C. and the Ahlfeld group may appeal only the order denying them intervention. Because their motions to intervene were denied, the potential intervenors never became named parties to the case; therefore, they have standing only to appeal the order regarding intervention. *See United States v. City of Chicago*, 870 F.2d 1256, 1258 (7th Cir.1989) (stating that until putative intervenors become parties "they cannot appeal from any order in the proceeding other than the denial of that motion"); *Hunter v. Department of the Air Force Agency*, 846 F.2d 1314, 1317 (11th Cir.1988) (noting that "one who is denied permission to intervene in an action will not be in a position to take an appeal from the final judgment"). The district court recognized that its denial of intervention mooted the putative intervenors' other motions; however, it addressed the merits of the putative intervenors' motions for class certification in the context of RCPA's motion. R. 271, Mem.Op. at 13. Because we have affirmed the district court's decision not to accept the motions to intervene, we shall not address the putative intervenors' motions for class certification.

[15] Rule 23(a) states: One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

ate. *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir.1985). Our review of a district court's denial of class certification is therefore circumscribed. "We reverse a district court's ruling regarding class certification only when we conclude that the district court abused its discretion in reaching its decision." *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7th Cir.1993).[16] Furthermore, the party seeking class certification assumes the burden of demonstrating that certification is appropriate. *Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir.1984).

The plaintiffs sought class certification under Federal Rule of Civil Procedure 23(b)(2). This subsection requires that the court find that the opposing parties' conduct or refusal to act must be generally applicable to the class and that final injunctive or declaratory relief with respect to the entire class would be the appropriate remedy. Moreover, as a preliminary requirement for any class certification, a named plaintiff must demonstrate that his motion satisfies the mandate set forth in Federal Rule of Civil Procedure 23(a): he "must meet the prerequisites of numerosity, commonality, typicality, and adequacy of representation." *Harriston*, 992 F.2d at 703 (citations omitted). All of these elements are prerequisites to certification; failure to meet any one of them precludes certification as a class. Id. The district court determined that the proposed RCPA class satisfied both

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[16] *See also Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992) (stating same), cert. denied, ___ U.S. ___, 113 S.Ct. 972, 122 L.Ed.2d 127 (1993); *Simer v. Rios*, 661 F.2d 655, 668 (7th Cir.1981) (stating that denial of class certification reviewed only for abuse of discretion), *cert. denied*, 456 U.S. 917, 102 S.Ct. 1773, 72 L.Ed.2d 177 (1982).

the numerosity and commonality elements of Rule 23(a); however, it held that typicality and adequacy of representation had not been demonstrated sufficiently to allow certification.

1. Typicality

As this court stated in *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir.1983), the typicality requirement primarily directs the district court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large. "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." (quoting H. NEWBERG, CLASS ACTIONS § 1115(b) at 185 (1977)). "The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members." *De La Fuente*, 713 F.2d at 232. Nevertheless, for effective representation of a class, the named representatives' claims must "have the same essential characteristics as the claims of the class at large." *Id.*

The district court noted that the RCPA's primary assertion is that the City and the various Funds communicated to pension annuitants the availability of effectively free lifetime health care and that the annuitants relied upon those communications. These claims turn on representations allegedly made by the City and the Funds to various groups of city workers. The RCPA, however, is comprised entirely of police retirees. It is not known whether the communications allegedly made by the City and the Funds to each group of city employees

regarding the health care plan were identical. The only evidence in the record pertains to police pre-retirement seminars and, even in that circumstance, it is not known whether the communications were uniformly made at every seminar. Presumably each of the other three groups of city employees had its own pre-retirement seminars and pamphlets. Appellants have not provided any evidence other than speculation that any alleged communications by the City or the Funds to the fire, laborer, or municipal annuitants were the same as those made to the police. Even among the police, the record indicates that some annuitants heard these communications at retirement seminars, some read a booklet, some heard through word of mouth, and many simply had a general impression of the benefits to which they were allegedly entitled. Some were ignorant of any alleged promises.

Because the RCPA does not include individuals from all of the fund groups and there is no indication that each of these groups was treated identically by the City or by its respective fund, its claims cannot be deemed typical of the entire proposed class. The RCPA is composed only of retired police officers, and it simply cannot be assumed, especially because these communications were for the most part verbal,[17] that the claims of these

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[17] We note that there is some authority that claims based substantially on oral rather than written communications are inappropriate for treatment as class actions unless the communications are shown to be standardized. *Graham v. Security Sav. and Loan*, 125 F.R.D. 687, 690 (N.D.Ill.1989), *aff'd on other grounds, Veal v. First American Sav. Bank*, 914 F.2d 909 (7th Cir.1990); *Glick v. E.F. Hutton & Co.*, 106 F.R.D. 446, 450 (E.D.Pa.1985); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 888 (D.N.J.1984); *cf. Simon v. Merrill Lynch, Pierce, Fenner and*

(continued...)

police officers "have the same essential characteristics as the claims of the class at large." *De La Fuente*, 713 F.2d at 232. Unlike the situation in *De La Fuente* where "[a]ll members of the class were subject to the same allegedly unlawful practices," *id.*, the putative class has not demonstrated that the police annuitants' claims have the same essential characteristics as the claims of the class at large. Nor have they demonstrated that the same alleged course of conduct occurred with respect to the other types of annuitants. Moreover, the asserted estoppel claims depend on the particular nature of the communications allegedly made in a particular instance and on each annuitant's reliance on that particular communication.[18] Therefore, we are not persuaded that the district court abused its discretion when it determined that the putative class had not satisfied the typicality requirement.

2. Adequacy of representation

Although failure to fulfill the typicality requirement of Rule 23(a) would, standing alone, invalidate class certification, the district court went on to determine that the proposed RCPA class had not demonstrated adequacy

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[17] (...continued)
Smith, Inc., 482 F.2d 880, 882 (5th Cir.1973). We also note that these cases are mainly fraud and securities cases.

[18] In regard to estoppel, the RCPA asserts that as a matter of law, reliance may be imputed by virtue of the fact that all of the RCPA's members or their decedents worked for the City until their retirement. The lone case that the RCPA cites in support of this assertion, *Buddell v. Board of Trustees, State Univ. Retirement Sys.*, 118 Ill.2d 99, 112 Ill.Dec. 718, 514 N.E. 2d 184 (1987), does not stand for such a proposition.

of representation. We have stated that adequacy of representation is composed of two parts: "the adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest" of the class members. *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir.1986) (en banc). Therefore, "[a] class is not fairly and adequately represented if class members have antagonistic or conflicting claims." *Rosario*, 963 F.2d at 1018; *see also Fitzsimmons*, 805 F.2d at 697 (stating same).

The district court expressed several reservations about the adequacy of class representation afforded by the RCPA. One of the key infirmities noted by the court was that the scope of the proposed RCPA class was not restricted to those members whose premiums had increased under the City's health care plan. Members who had actually benefitted from the *Korshak* settlement were also included in the putative class. For these members, those benefits would evaporate if the class action succeeded. For example, widows of retirees are paying less in premiums than they were before the *Korshak* settlement because they are now receiving subsidies. The RCPA states that no annuitant has objected to the institution of this class action. This response, however, does not resolve the potential conflicting interests that may exist among the RCPA members. The problem of actual and potential conflicts is a matter of particular concern in a case such as this one because the RCPA's complaint proposed certification under Federal Rule of Civil Procedure 23(b)(2) which does not allow class members to opt out of the class action. See R. 271, Mem.Op. at 13 n. 2.

In assessing the adequacy of representation, the district court also noted that, at the time of the *Korshak* settlement, RCPA Executive Secretary Richard Jones was a member of the Board of Trustees of the Police Fund, and he had participated in the Board's action in approving the settlement. In the present action, the RCPA contends that the Fund trustees breached their fiduciary duties to the annuitants by approving the settlement. Thus, noted the district court, there may also be a conflict of interest between the RCPA and one of its officers. While the RCPA stresses that it is the proposed class representative and not Jones, thereby eliminating any conflict between Jones and the putative class members, we agree with the district court that this position is troublesome. Jones is the Executive Secretary of the RCPA, the organization instituting this action. As such, a tension surely exists between his previous action and the RCPA's position in this case. For all of these reasons, we do not believe that the RCPA has established that the district court abused its discretion when it determined that the adequacy of representation criterion of the class certification requirements had not been satisfied.

Additionally, contrary to the RCPA's submission, we do not believe the district court engaged in an impermissible examination of the merits of the RCPA's claims in arriving at its denial of class certification. It is true that, as a general principle, a court is not allowed to engage in analysis of the merits in order to determine whether a class action may be maintained. *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir.1981), cert. denied, 455 U.S. 1017, 102 S.Ct. 1710, 72 L.Ed.2d 134 (1982). Nevertheless, some discovery may be necessary to determine whether a class

should be certified. *Id.* The Supreme Court has stated: As we noted in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 [98 S.Ct. 2454, 57 L.Ed.2d 351], "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Id.* at 469 [98 S.Ct. at 2458] (quoting *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558 [83 S.Ct. 520, 522, 9 L.Ed.2d 523] [1963]). Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. *General Tel. Co. v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982). We have noted that the "boundary between a class determination and the merits may not always be easily discernible." *Eggleston*, 657 F.2d at 895. After reviewing the record, we do not believe that the district court transgressed this dividing line. The court correctly analyzed the class certification issue. The appellants have not demonstrated that the district court abused its discretion in refusing to grant the motions for class certification.

3. Certification of subclasses

The RCPA contends that the district court abused its discretion because it did not certify a subclass composed only of annuitants from the Police Fund.[19] The RCPA be-

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[19] Certification of subclasses is allowed under Federal Rule of Civil Procedure 23(c)(4) which states: "When appropriate (A) (continued...)

lieves that such certification would obviate the district court's concerns with typicality and adequacy of representation, the issues that the court found made certification of the RCPA class as a whole inappropriate. The RCPA notes that it requested certification of this subclass in its motion for reconsideration filed in February 1992, after the district court initially denied class certification.[20] Although the court did grant the motion for reconsideration of the district court's initial judgment, to the extent that the RCPA moved for certification of a police subclass, that motion was denied when the court denied all motions pending at the time of summary judgment. See R. 271 and 273. The RCPA claims that the district court abused its discretion by not certifying the requested subclass.

Subclasses must satisfy the class action requirements before they may be certified. Fed.R.Civ.P. 23(c)(4). While the district court did not deny explicitly the subclass request, we believe that a fair reading of the record supports the conclusion that the court believed that, even

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[19] (...continued)
an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

[20] RCPA's request for certification of a subclass stated: "The Court's conclusion as to the varying extent of reliance among the proposed class does not justify its denial of certification of the entire class. The Court could have certified a smaller subclass(es). . . . At the very least, the Court's finding of uniformity in the representations made to Police Fund retirees . . . would support its certifying a class comprised of Police Fund retirees." R. 262 at 10.

among the retired police officers, uniformity in the alleged promises made by the City and the Funds had not been demonstrated. R. 271, Mem.Op. at 24. The district court found that sufficient evidence of the uniformity of statements formally made by City officials and the Police Fund to the police annuitants in regard to health care benefits during the time period here at issue had not been tendered by the RCPA. Moreover, as noted above, adequacy of representation was not demonstrated by the RCPA. Certification of a subclass consisting only of police annuitants would do nothing to alleviate the conflicts of interest that the district court found existed in that group. Given the limited scope of our review of a district court's denial of class or subclass certification, we do not believe that the RCPA has sufficiently demonstrated an abuse of discretion by the district court.

D. Associational Standing

We now turn to the question of whether the RCPA, although not eligible to act as representative for the putative class, may nevertheless maintain the suit in a representational capacity on behalf of its own members.[21] As the Supreme Court recently emphasized, this inquiry is analytically distinct from the class action issue. *In International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock*, 477

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[21] We also note that under the associational standing doctrine, an association may represent only its members or the substantial equivalent of members. *HOPE, Inc. v. County of DuPage*, 738 F.2d 797, 814 (7th Cir.1984) (en banc); *cf. American Legal Found. v. FCC*, 808 F.2d 84, 91 (D.C.Cir.1987) (quoting *HOPE* with approval). RCPA's associational standing should be limited to its own members.

U.S. 274, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986), the Court specifically noted that, while an organization might prove an inadequate representative in some instances to vindicate the rights of its members because of its lack of resources and experience or because it lacks the appropriate authority from its membership, it will more often present a particularly efficient vehicle for litigation from both the viewpoint of the litigants and the perspective of the judicial system. These efficiencies, stated the Court, "distinguish suits by associations on behalf of their members from class actions." 477 U.S. at 289, 106 S.Ct. at 2532. The Court went on to note that, while a class action creates an ad hoc union of injured plaintiffs whose only common link may be their common claims, a preexisting organization can often draw upon a preexisting reservoir of experience, research, and capital. These resources, continued the Court, can often sharpen the presentation of issues appreciably—one of the primary concerns of the doctrine of standing. *Cf. Flast v. Cohen*, 392 U.S. 83, 106, 88 S.Ct. 1942, 1955, 20 L.Ed.2d 947 (1968) ("The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962))). The Court stressed that its evaluation was based on the pragmatic view that people join organizations in order to promote interests that they share with the other members. "The very forces that cause individuals to band together in an association will thus provide some guarantee that the

association will work to promote their interests." 477 U.S. at 290, 106 S.Ct. at 2533.

Generally, an injured party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed. 2d 343 (1975). Nevertheless, some exceptions to this rule exist and, in certain cases, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Id.* at 511, 95 S.Ct. at 2211. [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

While the Hunt test is well-established in our jurisprudence and enjoys the specific reaffirmation of the Supreme Court in *Brock*, the application of the various prongs has, to this date, produced a caselaw that does not lend itself to easy distillation.[22] To adjudicate this appeal, we must first address the methodology of the district court. We shall then address an issue that, while

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[22] The Supreme Court has recently discussed what type of injury an association must allege in order to demonstrate standing. *Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, ___ U.S. ___, ___ - ___, 113 S.Ct. 2297, 2303-04, 124 L.Ed.2d 586 (1993). That decision does not affect directly our analysis.

not confronted squarely by the district court in this context, is bound to be a concern in subsequent proceedings.

The district court focused on the third element of the Hunt test for associational standing, and found that the RCPA had failed to satisfy this element. Therefore, the court did not address the other prongs. The court was of the view that the RCPA did not have representational standing because the claims it alleged would require the participation of individual RCPA members. The court noted that the RCPA's claims were not premised on pure questions of law, but rather involved claims that would require the participation and testimony of individual annuitants. R. 271, Mem.Op. at 33. Specifically, the court stated that the RCPA's claim for lifetime health care coverage at the 1982 rates is "based on a broad array of communications, both written and oral, direct and indirect, emanating from countless sources." Id. at 34. Moreover, the estoppel claim mandated individualized inquiry into the RCPA members' reliance on the various alleged communications regarding health care coverage in each member's choice to retire or to participate in the City's plan.

1. Participation of individual members

Our colleagues in the Third Circuit recently confronted a case similar in many ways to our own. In *Hospital Council of Western Pennsylvania v. City of Pittsburgh*, 949 F.2d 83 (3d Cir.1991), the Hospital Council[23] had

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[23] The complaint alleged that the Council was a Pennsylvania non-profit corporation that functions as a membership organization representing, assisting, and speaking for its members in matters where joint action is appropriate.

filed a complaint in the district court alleging that the defendant governmental units were attempting to force tax-exempt member hospitals to make payments in lieu of taxes by indicating that, if the hospitals did not make such payments, their tax-exempt status would be challenged or they would likely encounter difficulty with other governmental matters such as zoning approvals. The district court dismissed the complaint. One of the grounds for its ruling was that the Council had not met the third requirement of Hunt; it held that the claims asserted and the relief requested would require participation of the individual hospitals in the lawsuit.

In assessing whether participation of individual members was necessary, the Third Circuit noted that, in the third prong of *Hunt*, the Supreme Court stated that associational standing is inappropriate if the claim or request for relief requires "the participation of individual members in the lawsuit." *Hospital Council*, 949 F.2d at 89 (quoting *Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441). Viewed alone, said Judge Alito, this language could be interpreted to mean that associational standing is not permitted if participation by any members of the association would be necessary. However, the court noted that this language in *Hunt* appears to paraphrase a more detailed statement first made by the Supreme Court in *Warth* and repeated in later cases. In *Warth*, 422 U.S. at 511, 95 S.Ct. at 2212, the Supreme Court wrote, "so long as the nature of the claim and the relief sought does not make individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." (emphasis added). Accordingly, concluded the Third Circuit, it

appears that an association may assert a claim that requires participation by some members.

Turning to the case before it, the Third Circuit continued that the council's claims would require some participation by some council members. The court also acknowledged that, unlike many prior associational standing cases, the case was not a challenge to a statute, regulation, or ordinance, but instead involved a challenge to governmental practices. Consequently, it would probably be necessary to prove, through evidentiary submission, the manner in which the defendants treated individual member hospitals. Such litigation would likely require that member hospitals provide discovery and trial testimony by their officers and employees. Nevertheless, concluded the Third Circuit, such participation would not constitute participation by "each injured party" in the suit and run afoul of the third prong of the Hunt test.

We believe that the approach of the Third Circuit is a sound one.[24] We can discern no indication in *Warth*,

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[24] While the reported decision does not permit full assessment, the decision of the Tenth Circuit in *Kansas Health Care Ass'n v. Kansas Department of Social & Rehabilitation Services*, 958 F.2d 1018 (10th Cir.1992), may be in some tension with the approach of the Third Circuit. In that case, two health care associations sought a preliminary injunction against the Kansas Department of Social & Rehabilitation Services. The health care associations represented a total of 335 nursing facilities located in Kansas. Their members participated in the federally funded Kansas Medicaid Program and received reimbursement for health care services provided for eligible medicaid recipients. The Kansas agency (SRS) calculated each health care provider's reimbursement rate by focusing on its historical costs and also considered where those costs fell in a percentile comparison with costs reported by other pro-

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[24] (...continued)
viders. SRS implemented a rate freeze and prior to the rate freeze each facility submitted two cost reports during each fiscal year and SRS adjusted its reimbursement rate for each facility to reflect the most current cost report. However, under this new plan, SRS would no longer readjust reimbursement rates based on cost reports. Rather, it would determine each facility's rate of reimbursement on the basis of the facility's last cost report filed before October 1, 1990. Plaintiff-associations brought an action seeking a preliminary injunction against the two state plan amendments. Proceeding as representatives of their members, the associations contended that, although SRS made assurances to the federal government, the findings made by SRS under the amendments did not support the assurances that were made and did not comply with federal law. They also contended that the reimbursement rates established by SRS were substantially deficient. They claimed that the rates were not adequate and reasonable to meet the costs of efficiently and economically operated facilities. The Tenth Circuit held that the third prong of the Hunt test had not been met. The court acknowledged that individual participation might not be necessary with respect to the requested relief of a preliminary injunction. However, the court noted that, under the Hunt test, an association has standing only if " 'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' " Kansas Health Care, 958 F.2d at 1022 (quoting Hunt, 432 U.S. at 343, 97 S.Ct. at 2441). The court conceded that, under some circumstances, a court may be able to make a cursory review of a reimbursement system and determine that reimbursement rates are not adequate. It also noted that, in an earlier case, the district court had been able to conclude, with minimum participation of individual providers, that the reimbursement system was inadequate. By contrast, the court here stated, "we will be required to examine evidence particular to individual providers. For example, to determine whether a 4.8% inflation rate insufficiently accounts for increased costs incurred by providers, we simply will be forced to review evidence that pertains to individual providers." 958 F.2d at 1022-23. The court also indicated that it was open to the government to show that some facilities might not be efficiently operated. With respect
(continued...)

Hunt, or *Brock* that the Supreme Court intended to limit representational standing to cases in which it would not be necessary to take any evidence from individual members of an association. Such a stringent limitation on representational standing cannot be squared with the Court's assessment in *Brock* of the efficiencies for both the litigant and the judicial system from the use of representational standing. Rather, the third prong of *Hunt* is more plausibly read as dealing with situations in which it is necessary to establish "individualized proof," 432 U.S. at 344, 97 S.Ct. at 2442, for litigants not before the court in order to support the cause of action.[25]

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[24] (...continued)
to the plaintiffs' claim that SRS had failed to make the findings required by federal law, the district court held that it would have to review these procedural findings and scrutinize specific health care providers who were not parties to the action. The district court simply could not review these inferences adequately by looking solely at the data processed and produced by the state. Thus, the third prong of Hunt had not been satisfied. To the extent that Kansas Health Care's methodology differs from that of the Third Circuit, we believe that the Third Circuit's approach is the preferable one.

[25] In *Southwest Suburban Board of Realtors, Inc. [SSBR] v. Beverly Area Planning Ass'n*, 830 F.2d 1374 (7th Cir.1987), this court was faced with an action by a trade association of real estate brokers alleging that the defendant had conspired to monopolize real estate brokerage transactions in violation of the antitrust laws. We noted, albeit in dicta, that SSBR might not be able to meet the third part of the *Hunt* test. We noted that, in *Cargill v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986), the Supreme Court had held that section 16 plaintiffs must demonstrate a threat of antitrust injury. Establishing antitrust injury therefore involved complex questions of fact and required proof of actions taken by the defendants against individual SSBR members.
(continued...)

Finally, we note that, while the third prong of the *Hunt* test requires that we conclude that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," *Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441, associational standing does depend "in substantial measure on the nature of the relief sought." *Warth*, 422 U.S. at 515, 95 S.Ct. at 2213. Declaratory, injunctive, or other prospective relief will usually inure to the benefit of the members actually injured and thus individualized proof of damages is often unnecessary. Id.

We believe that the present case, at least with respect to the contractual claim, is very close to the situation that confronted the Third Circuit in *Hospital Council*. In that case, at issue was whether the defendant governmental entities had pursued the policy of which the plaintiffs complained; the court believed that issue could be answered through the evidence submitted by, among others, some of the parties. Here, the issue is whether the City made certain binding representations with respect to its health care funding obligations. Recovery would not require that each and every member of the RCPA establish that he was the recipient of a misrepresentation by the City or the Police Fund.[26] The RCPA

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[25] (...continued)
We held that it was "likely that considering the nature of the antitrust injury alleged here, the claims asserted by SSBR would require the participation of individual members in the lawsuit." *Southwest Suburban*, 830 F.2d at 1381.

[26] We do not, of course, mean to imply that recovery is justified or even that the plaintiff's action states a claim upon which relief can be granted. These issues have yet to be reached by the district court.

would have to establish, through circumstantial evidence, that the alleged breach occurred. This evidence might be supplied by the evidentiary submissions of some of the members. Each annuitant's presence as a party would not be required.

2. Conflicts of interest

Because we believe that the district court employed an inappropriate methodology in assessing whether the RCPA may maintain this action on behalf of its own members, that court will have to address this issue once again on remand. At that time, it will no doubt have to confront the problem that it addressed with respect to the matter of class action representation under Rule 23—whether the existence of conflicts of interest within the group preclude the RCPA from acting in this capacity. While the inquiry with respect to Rule 23 and the inquiry with respect to associational standing have many similarities, as Judge Bork noted in *National Maritime Union of America v. Commander, Military Sealift Command*, 824 F.2d 1228, 1233 (D.C.Cir.1987), the Supreme Court's decision in Brock makes clear that different factors must be weighed in each case. Because it appears inevitable that the district court will have to confront this issue, we believe considerations of judicial economy counsel that we address it at this point.

The circuits have not been uniform in their approach to the presence of conflicts of interest in an association seeking standing. Indeed, they have elected to analyze the problem under various parts of the Hunt test. We shall review the major contributions by the various circuits and then articulate what appears to us to be the proper course for the district court upon remand.

Some circuits appear to take the view that a conflict of interest among group members is not relevant to whether associational standing ought to be permitted. In *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992), the court expressed the view that the third prong of the *Hunt* test did not require the absence of any actual or potential conflict among the organization's members. *Id.* at 1408. It could find no basis for such an inquiry in the Supreme Court's pronouncements in *Hunt* or *Brock*. Id. Furthermore, it believed that the Supreme Court had implicitly rejected the argument in *Brock* when it distinguished the requirements for Rule 23 class certification from the requirements for group standing. It noted that the *Brock* court had contrasted the ad hoc nature of a Rule 23 class assembled for the sole purposes of litigation and the strengths of a pre-existing group that can "draw upon a pre-existing reservoir of expertise and capital." *Id.* at 1409 (quoting *Brock*, 477 U.S. at 289, 106 S.Ct. at 2532). The court noted that, while the Supreme Court in *Brock* had acknowledged the possibility that some organizations would not always be able to represent all of their members, such an eventuality, when it arose, could be solved by denying issue preclusion against the members not adequately represented or by fashioning some other remedy short of requiring unanimity of interest. *Id.* (citing *Brock*, 477 U.S. at 290, 106 S.Ct. at 2533). The court also stated that requiring unanimity among the group's membership would, as a practical matter, terminate the viability of group representation because most groups are organized for purposes far broader than the subject matter of a particular lawsuit, and the presence of some dissident members is inevita-

ble. Accordingly, it held that: [A]n organization's internal conflicts properly should be resolved through its own internal procedures, not through limitations on standing. Our ruling should not be deemed to allow the silencing of dissenters' voices within an organization: the interests of these dissenters should be taken into account either through liberal approval of their intervention in the lawsuit or, as the *Brock* Court suggested, through refusal to preclude subsequent claims by dissenting members. *Id.* at 1409.

The District of Columbia Circuit also appears to follow this view. In *National Maritime Union*, 824 F.2d at 1228, the court was confronted with an action brought by three unions to enjoin the performance of a contract awarded to a particular company by the Military Sealift Command. The unions alleged injury to their members and attempted to sue as representatives of those members. In applying the Hunt test, the court addressed the contention that the unions lacked standing because the employees they sought to represent had conflicting interests in the outcome of the litigation. The court frankly noted that this contention "may be seen as an attempt to add a fourth factor to those specified by Hunt or as an aspect of the third." *Id.* at 1232. To address this concern, the District of Columbia Circuit determined that "associational standing does not necessarily depend upon harmony of member interests." *Id.*

First of all, it was of the view that the Supreme Court had decided the issue in *Brock*. Judge Bork noted that, in *Brock*, the Supreme Court had stated that the inability of an association to represent adequately all injured members could be handled by not permitting a resulting judgment to preclude subsequent claims by the associa-

tion's members who had not been adequately represented. He noted that *Brock* had said: "Should an association be deficient in this regard, a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles." *Id.* at 1233 (quoting *Brock*, 477 U.S. at 290, 106 S.Ct. at 2533). Judge Bork continued by noting that the Supreme Court "appeared to deal with the problem of conflicting interests by saying that associational standing was too valuable to jettison and offering possible safeguards for members whose interests were adverse to the litigating position taken by the association." *Id.* at 1233. He further stated that, to the degree there was any ambiguity in the Supreme Court's holding in *Brock* and the court of appeals was free to address the issue as a matter of first impression, the result suggested by *Brock* was the correct one. Most, or perhaps all, associations, even though created to serve the members' common interests, will have internal conflicts about appropriate organizational policies. Such conflicts are typically resolved by the association's internal procedures or political structure. Inevitably, some resolutions will harm some members' interests, but that is usually accepted as part of the cost of obtaining the benefits of association. Courts would ordinarily uphold an association's determinations against internal challenge unless it were shown that the organization's own procedures had been violated. It is not obvious to us that this rationale should not apply to an association's internal resolution of conflicts about litigating positions. *National Maritime Union*, 824 F.2d at 1233. Allowing group standing under these circumstances, Judge Bork wrote, did not mean that the rights of the individual members whose interests did not conform to the position of the group ought to be forgotten. He noted

that such individuals, if they had standing, could intervene to advance their interests against the association's position on the merits. He also indicated that it might be possible for such members to challenge the association's standing by showing that the group's internal procedures for adopting the position had been ignored.

The same theme was articulated by the Third Circuit in *Hospital Council of Western Pennsylvania*, 949 F.2d at 83. In that case, it had been suggested that the interests that the organization sought to promote were adverse to those of some of the members because some members may have wished to benefit from the favorable treatment allegedly given by the defendant state agencies to institutions entering into agreements to make payments in lieu of taxes. Relying on its earlier decision in *Contractors Ass'n v. City of Philadelphia*, 945 F.2d 1260 (3d Cir. 1991), the court held that the association had standing to assert its claim. The court also noted that in the case before it, there was no basis for concluding that those council members who had entered into such agreements felt that the relief sought in the lawsuit would not be beneficial. The court noted that, while it was possible that such member hospitals might prefer to continue making payments in exchange for favorable treatment, it was also possible that they might prefer to stop making the payments.

The Third Circuit's earlier case, *Contractors Ass'n*, is helpful in understanding the considerations at issue when conflicts of interest arise because, in that case, the Third Circuit directly confronted with more elaboration the impact of conflicts among members on an organization's standing. The Contractors Association of Eastern Pennsylvania, together with other trade associations, had

challenged Philadelphia's public contract set-aside law as violative of the equal protection clause of the Fourteenth Amendment. Some of the Contractors Association's members qualified as disadvantaged businesses and actually opposed the litigation, thus the conflict of interest existed within the association itself. The court acknowledged that, in *Polaroid Corp. v. Disney*, 862 F.2d 987, 999 (3d Cir.1988), it had stated that "associational standing has never been granted in the presence of serious conflicts of interest either among the members of an association or between an association and its members."

Polaroid addressed whether a target corporation had standing to assert the interests of the shareholders in a hostile takeover. The court noted two possible conflicts that could prevent the target corporation from seeking standing on behalf of the shareholders. First, there was a conflict between management who might seek to defeat the takeover and remain in control and the shareholders who could profit from the tender offer. The second conflict was between the shareholders who might profit from the tender offer (normally the majority of shareholders) and the target corporation when the corporation sides with the shareholders who will be harmed by the tender offer (normally the minority shareholders). Nevertheless, it did not believe that Polaroid was controlling. It noted that only 29 of the 535 members of the association were members of the disadvantaged group and, therefore, there was no question that the association was representing the majority of its members. Under these circumstances, noted the court, there was little chance that the conflict between the majority and minority contractors would either affect the adequacy of representation or would present the possibility of a collusive suit. When an

association has not violated its members' rights by ignoring the association's by-laws before bringing an action on a matter of concern to the membership, it is primarily concern over the absence of strong advocacy on both sides of a controversy that has motivated courts to hold that a conflict of interest among its members deprives an association of associational standing. *Contractors Ass'n*, 945 F.2d at 1265. Because the position of the Contractors Association was not contrary to the interests of a majority of its members, and there was nothing on the record to indicate that they had failed to follow their own internal rules before joining the litigation, the perceived conflict of interest did not bar associational standing.

The Court of Appeals for the Fourth Circuit has taken what, at least at first glance, might seem to be a contrary position. In *Maryland Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246 (4th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 373, 116 L.Ed.2d 325 (1991), the plaintiff association sought declaratory and injunctive relief against Maryland on the ground that the state's "Minority Business Enterprise" (MBE) statute and its accompanying regulations violated the constitutional and statutory rights of the association and its members. Although the court dismissed the case as moot, it went on to hold that the association lacked standing to bring the action on behalf of its members. The court held that the association had failed to meet the third requirement of Hunt. The court stated that the third prong could not be met when "conflicts of interest among members of the association require that the members must join the suit individually in order to protect their own interests." *Id.* at 1252. The court noted that some of the members of the association were certified MBE's and therefore bene-

fitted from the continued enforcement of the MBE statute; other non-minority members of the association would benefit if the statute were declared unconstitutional. Thus, there were actual conflicts of interest that required individual members to come into the lawsuit to protect their interests.

The court also noted that the decision to litigate in this case had been made by the association's Board which did not have a MBE representative. The Board had also taken the unusual position of not telling the members of its decision to litigate until after the suit had already been filed. This secrecy, noted the Fourth Circuit, raised suspicion with respect to the motives of the association. Id. at 1253. Therefore, "[b]ecause of the actual conflict of interest and the potential for conflict in this case, the Association has failed to meet the third prong of the Hunt test." Id.

In our own circuit, we have addressed this problem in *Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374 (1987). The SSBR, a trade association of real estate brokers, brought an action charging that the defendant neighborhood planning association, certain of its employees and volunteers, and certain real estate brokerage entities had conspired to control and monopolize real estate transactions in violation of the antitrust laws. The SSBR contended that it had standing to maintain an antitrust action against the defendants on two grounds. First, it argued that it had proprietary standing under section 4 of the Clayton Act to seek treble damages because it had sustained an injury. Second, it argued that it had representational standing under the Hunt test. We held that the second prong of the Hunt test, the so-called "germaneness" test,

had not been satisfied. The alignment of the parties in the action evidenced, the court held, a serious conflict in SSBR's interest. 830 F.2d at 1380. At least three of the named real estate brokerage defendants were members of SSBR, and thus SSBR was in effect suing certain of its members on behalf of other members. Judge Cummings, writing for the court, held that [i]f SSBR were permitted to pursue this action and were ultimately successful in obtaining the requested injunctive relief, its defendant members would without question be adversely affected and perhaps even seriously disadvantaged by the strictures of the injunction. That the remedy sought may directly affect certain members of SSBR gives rise to both actual and potential conflicts of interest among the members as a group, with the result being that their interests demand individual, not associational, representation. *Southwest Suburban Realtors*, 830 F.2d at 1381.

The approach of the Fourth Circuit in Maryland Highways and of this court in Southwest Suburban is no doubt best explained by a close examination of the facts of these two cases. In both situations, the conflict of interest among the members was profound. In Maryland Highways, the suit not only worked to the direct detriment of the minority members of the Association, but was undertaken by the Association without observance of its own by-laws. In Southwest Suburban, Judge Cummings noted that "what this suit amounts to is SSBR suing certain of its members on behalf of other of its members." 830 F.2d at 1381. The court noted that at least three of the defendants were members of SSBR.

Indeed, it is not without significance that Judge Cummings analyzed the conflict of interest problem not under the third prong of the Hunt test, but under the so-called

"germaneness" test of the second prong. This second prong has received little elaboration by the Supreme Court. However, our colleagues in the District of Columbia Circuit have suggested that *Brock* provides significant guidance for its use. The Supreme Court's recognition in *Brock* of the special advantages offered by associational suits signals, wrote the District of Columbia Circuit in *Humane Society v. Hodel*, 840 F.2d 45 (D.C. Cir.1988), the importance of a reading of the germaneness requirement that does not unduly confine the occasions on which associations may bring legal actions on behalf of members and thus significantly restrict the opportunities of associations to utilize their "specialized expertise and research resources" relating to the subject matter of the lawsuit. Id. at 56 (quoting *Brock*, 477 U.S. at 289, 106 S.Ct. at 2532). The District of Columbia Circuit reasoned that, if the "forces that cause individuals to band together" guarantee some degree of fair representation, they surely guarantee as well that associational policy-makers will not run roughshod over the strongly held views of association members in fashioning litigation goals. Humane Society, 840 F.2d at 56 (quoting *Brock*, 477 U.S. at 290, 106 S.Ct. at 2533). It would appear, concluded the District of Columbia Circuit, that the germaneness test simply requires that "an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together." Id. (footnote omitted). This expansive definition of "germaneness" in *Hodel* carries within it its own limitations—limitations that are reached in *Maryland Highways* and *Southwest Suburban* because it was clear in those cases that the associations were not really operating along the lines for which they had been organized. In each case, they were operating as less permanent structures merely

for litigation purposes and not for the purposes stated in their charters.

On remand, we believe that the district court must begin, as did we, with the pronouncement in *Brock*. In determining whether representational standing is appropriate with respect to any of the counts in the complaint,[27] the court must evaluate the specific circumstances of this case in light of the characteristics of preexisting groups in the conduct of litigation set forth in *Brock*. It must determine whether those characteristics sufficiently outweigh whatever deficiencies it identifies in the RCPA for purposes of standing. With respect to the issue of actual and potential conflicts, it must assess whether, as *Brock* teaches, other approaches less drastic than denying group standing, will provide adequate protection for the interests of those whose position is not represented by the group, while affording the group and the judicial system as a whole the efficiencies that Brock has identified in associational standing. We are aware that the district court has already engaged in a similar inquiry with respect to the class action issue. But, as *Brock* makes plain, the inquiry with respect to associational standing, while similar, is not identical but tailored to the capacities of this particular form of litigation.

E. Denial of Preliminary Injunction

Several times in the course of this lengthy litigation, the appellants sought preliminary injunctions from the

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[27] It would appear that the supplemental state law claim based on estoppel would require "individualized proof" and therefore could not be maintained by a group suing on behalf of its members.

district court. In February 1990, the RCPA brought its first motion for a preliminary injunction to keep the City from altering the rates charged for its health care plan during the litigation. This motion was referred to a magistrate judge who continued RCPA's motion on assurances by the City that it would not raise the rates for the RCPA claimants without notifying plaintiff's lead counsel. See R. 30. Despite these assurances, in October 1991, the City determined that it would change the rates charged for health care coverage under the plan for the RCPA class. The RCPA once again sought a preliminary injunction, but the motion was denied, as was the RCPA's request for reconsideration. On November 12, 1991, the City reiterated its intent to alter its health care plan. Again the RCPA filed a motion for preliminary injunction; the district court delayed ruling on the motion and the City's new plan went into effect on January 1, 1992. The RCPA's final motion for preliminary injunction was denied on March 25, 1992, after the court had dismissed the RCPA's complaint. The district court simply issued an order denying all of the RCPA's pending motions, but before judgment was entered. R. 273.

As a prefatory note, the City and the Funds contend that the denial of the motion for preliminary injunction is unreviewable by this court. They invite our attention to the timing of the RCPA's appeal from the denial: the motion from which the RCPA appeals was denied on October 8, 1991, while the notice of appeal was filed on May 29, 1992. Focusing their attention on the relevant dates, the City and the Funds assert that the denial was

appealable as of right under 28 U.S.C. § 1292(a)(1)[28] and as such, should have been appealed immediately within the thirty-day time limit of Rule 4(a) of the Federal Rules of Appellate Procedure. The City thus contends that the RCPA cannot now appeal the district court's denial of the RCPA's motion for preliminary injunction.

Although an order denying a preliminary injunction is immediately appealable as an interlocutory decision under 28 U.S.C. § 1292(a)(1), an immediate appeal nonetheless is not mandated by the statute. A party may forgo an interlocutory appeal and present the issue for appeal after final judgment. "Interlocutory orders therefore may be stored up and raised at the end of the case. . . ." *Kurowski v. Krajewski*, 848 F.2d 767, 772-73 (7th Cir.), *cert. denied*, 488 U.S. 926, 109 S.Ct. 309, 102 L.Ed. 2d 328 (1988).[29] Consequently, the RCPA has not waived

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[28] This section provides in pertinent part: (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. . . . 28 U.S.C. § 1292(a)(1).

[29] *See also SEC v. Quinn*, 997 F.2d 287 (7th Cir.1993) (stating that parties are not obligated to seek immediate review of interlocutory orders under § 1292(a)(2)); 9 James W. Moore et al., Moore's Federal Practice P 110.18 (stating that "[i]f matters are adjudged by an interlocutory decree that is subject to immediate appeal, and no appeal is taken, they are not foreclosed, but are subject to review on appeal from the final judgment"). "[E]ven those [decisions] producing interlocutory 'judgments' (such as the denial of a preliminary injunction) receive the same treatment." *Kurowski*, 848 F.2d at 772; *accord United States v. Clark*, 445 U.S. 23, 25 n. 2, 100 S.Ct.

(continued...)

its right to appeal the denial of its motion for preliminary injunction.

In reviewing a denial of a motion for preliminary injunction, we "apply the clearly erroneous standard to any factual determinations; necessary legal conclusions are subject to de novo review." *In re L & S Indus., Inc.*, 989 F.2d 929, 932 (7th Cir.1993). A party seeking a preliminary injunction bears the burden of demonstrating: (1) an absence of an adequate remedy at law; (2) irreparable harm in the absence of an injunction exceeding the irreparable harm the other side will suffer if the injunction issues; (3) a reasonable likelihood of success on the merits; and (4) harm to the public interest that stems from the injunction and is tolerable in light of the benefits achieved by the relief. *West Allis Memorial Hosp., Inc. v. Bowen*, 852 F.2d 251, 253 (7th Cir.1988).

The district court held that none of the classes could be certified, that none of the movants could be allowed to intervene, and that the RCPA had no standing to assert the claims of its members. Today, we affirm all of these determinations except that the RCPA ought to be given the opportunity to demonstrate that it has associational standing to represent its members. Unless and until that matter is resolved in favor of the RCPA, it cannot demonstrate a reasonable likelihood of success on the merits of its claims; therefore, the district court did not err in denying the motion for preliminary injunction.

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[29] (...continued)
895, 899 n. 2, 63 L.Ed.2d 171 (1980) (noting that under 28 U.S.C. § 1252 government was allowed to seek immediate review of interlocutory order, but was not required to do so prior to entry of final judgment).

Conclusion

For the foregoing reasons, we affirm the judgment of the district court in part and reverse and remand in part.[30]

AFFIRMED IN PART AND
REVERSED AND REMANDED IN PART.

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[30] Various parties have filed motions with the court inviting our attention to supplemental authority. This court can take judicial notice of the decisions of federal and state courts. The motions are denied as moot.

RETIRED CHICAGO POLICE ASSOCIATION,
Plaintiffs,

v.

The CITY OF CHICAGO, et al., Defendants.

No. 90 C 0407.

United States District Court,
N.D. Illinois, E.D.

March 23, 1992.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

Plaintiff Retired Chicago Police Association ("RCPA") filed this 42 U.S.C. § 1983 class action against the City of Chicago ("the city"), three of its officers, and four city employee pension funds. RCPA and various proposed intervenors (collectively "plaintiffs") purport to represent a class of pension plan annuitants who began participating in the city's Annuitant Healthcare Plan ("the health care plan") after December 31, 1987 and prior to August 23, 1989. Plaintiffs allege that a settlement agreement stemming from earlier litigation between the city and the pension funds changed the terms of the city's health care plan and the city and pension funds' related contractual obligations, thereby violating the Fourteenth Amendment due process and equal protection rights of purported class members. Plaintiffs further contend that the changes in the health care plan violate contract clause principles and that the settlement agreement between the city and funds is unenforceable on grounds of promissory estoppel, invalid special legislation violating the Illinois State Constitution, and breach of fiduciary duty by

the fund trustees. Plaintiffs seek declaratory and injunctive relief preventing the implementation of the settlement agreement, which allegedly increases the cost of health care coverage to the purported class.

Plaintiffs moved to intervene and for class certification pursuant to Fed.R.Civ.P. 23(b)(2). After extensive briefing, the court denied the motions for intervention and class certification on several grounds. *Retired Chicago Police Association v. City of Chicago*, No. 90 C 407 slip op. (N.D.Ill. February 6, 1992). Plaintiffs now move for reconsideration.

The court's denial of class certification raised a concern about RCPA's standing to continue participating as a party in this action. Thus, prior to the filing of plaintiffs' present motion for reconsideration, the court directed the parties to brief the issue of RCPA's standing. The court also permitted additional briefing on the issues raised in plaintiffs' motion for reconsideration of the denial of intervention and class certification.

The motion for reconsideration is granted. The February 6, 1992 memorandum opinion and order is vacated. The court reconsiders plaintiffs' motions for intervention and class certification in light of the issues raised in plaintiffs' motion for reconsideration. After reconsidering the motions for intervention and class certification, the court addresses RCPA's standing to maintain this action.

BACKGROUND

A. General Background

The four defendant pension funds—the Policemen's Annuity and Benefit Fund ("police fund"), the Firemen's An-

nuity and Benefit Fund ("firemen's fund"), Municipal Employees' Annuity and Benefit Fund ("municipal fund") and the Laborers' and Retirement Board Employees' Annuity and Benefit Fund ("laborers' fund") (collectively "the pension funds")—were created and operate under authority of Articles 4, 5, 6 and 11 of the Illinois Pension Code, Ill.Rev.Stat. ch. 108 1/2, to provide for and administer pension benefits of certain defined retired city employees. Complaint P 10. RCPA is an Illinois not-for-profit corporation organized for the purpose of protecting the benefits of retired Chicago police officers and their spouses. *Id.* At 5, 20.

Since the early 1980's, the city has made health care coverage available to its retired employees under the city's self-insured health care plan. *Id.* at 21, 24. In April 1982, the city set the monthly premium for annuitants participating in the health care plan at $55 for a single person and $21 for medicare eligible participants. *Id.* at 21-22. Later that year, the State of Illinois enacted legislation to take effect in January 1983, specifically addressing health care coverage for annuitants of the police and firemen's funds. Ill.Ann.Stat. ch. 108 1/2, PP 5-167.5, 6-164.2 (Smith-Hurd 1987).

The legislation directed the board of trustees of the police and firemen's annuity funds to contract with health insurance carriers to provide group health insurance for their respective annuitants. *Id.* The police and firemen's funds were directed to contribute $55 per month for non-Medicare qualified annuitants and $21 per month for Medicare qualified annuitants toward the payment of their annuitants' monthly health insurance premiums. *Id.* The revenues to cover this 55/21 premium outlay were to be contributed by the city from a special

property tax levy. *Id.*; Ill.Ann.Stat. ch. 108 1/2, PP 5-168, 6-165 (Smith-Hurd 1987). Under the legislation, the annuitants were themselves responsible for any premiums exceeding the 55/21 levels, with the excess to be deducted by the police and firemen's funds from their annuitants' monthly pension checks. *Id.* The statutory 55/21 premium subsidy requirement apparently mirrored annuitant premium costs under the city health care plan at the time the legislation was enacted.

In 1985, the Illinois legislature enacted statutes addressing health care coverage for annuitants of the municipal and laborers' funds. Ill.Ann.Stat. ch. 108 1/2, PP 11-160.1, 8-164.1 (Smith-Hurd 1987). This legislation differed from the statutory provisions governing health care coverage for police and firemen's funds. The municipal and laborers' fund legislation did not require the municipal and laborers' funds to contract for group health insurance. *Id.* Additionally, the municipal and laborers' funds were required to subsidize only $25 of the cost of health care coverage for their annuitants. *Id.*

Beyond the statutory minim for coverage of annuitant health care, RCPA alleges that the city, through various means of communication beginning in the mid-1980's, promised its employees free post-retirement health care coverage under the city health care plan. *Id.* At 26. The city allegedly conducted a series of pre-retirement seminars in which city health and benefits office agents, inter alia, represented that the employees' post-retirement benefits included free lifetime health care under the city's plan. *Id.* at 30-32. The city further is alleged to have prepared and distributed a booklet to employees and retirees who intended to participate in the health care plan. *Id.* at 27-28. Additionally, the pension funds

are alleged to have represented that they would pay the full premium charged to each of its annuitants for coverage under the health care plan, leaving the annuitants only with the obligation of paying additional premiums for spousal or dependent health care coverage. *Id.* at 21.

Although health care coverage costs rose significantly during the 1980's, monthly premiums for annuitants of the police and firemen's funds remained at the 1982 55/21 levels, with the city apparently absorbing the increased costs. *See Id.* at 23. In October 1987, the city responded to the mounting costs of health care coverage by notifying all four pension funds that it intended to discontinue its subsidization of annuitant health care coverage. *Id.* at 34. The city also filed suit in the Circuit Court of Cook County against the pension funds, seeking to terminate annuitant health care coverage and to force the pension funds to reimburse approximately $58 million the city had expended on annuitant health care benefits through September 1987. *Id.* at 34; *City of Chicago v. Korshak*, Circuit Court of Cook County, Chancery Div. No. 87 CH 10134. Although the state court dismissed the city's claims, a trial proceeded on the pension funds' counterclaims.

The city and pension funds ultimately reached a settlement of their dispute before the state court issued a ruling on the pension funds' counterclaims. Under the settlement agreement, the city and pension funds agreed to co-sponsor legislation before the Illinois General Assembly altering the then-existing Illinois Pension Code provisions governing annuitant health care. The resulting legislation that took effect on August 23, 1989, requires the city to pay at least 50 percent of annuitant health care costs through 1997. Ill.Ann.Stat ch. 108 1/2, PP 5-167.5,

6-164.2, 8-164.1 and 11-160.1 (Smith-Hurd Supp.1991). The pension funds' contribution to individual annuitant health care premiums is increased to $65 a month for non-medicare eligible annuitants and $35 a month for medicare eligible annuitants, escalating to 75/35 beginning in 1993. *Id.* Revenues for the pension funds' subsidy continue to be funded by special city tax levies. *Id.* Any premium amounts not covered by the city and pension fund subsidies must be paid by the annuitants individually, through pension check withdrawals. *Id.* On December 12, 1989, the state court approved the settlement agreement that was embodied in the amendments to the Illinois Pension Code.

B. Procedural History

On January 24, 1990, RCPA filed this class action against the city and pension funds on behalf of a proposed class comprised of: . . . [A]ll annuitants of the City of Chicago Police, Fire, Municipal and Laborers' Pension Funds and their spouses, survivors and dependents who are current participants in the City's Annuitant Healthcare Plan . . . and whose participation began after December 31, 1987, but prior to August 23, 1989. Complaint P 12. RCPA contends that the *Korshak* settlement agreement is invalid as applied to individuals who retired prior to August 23, 1989, in reliance on the representations of the city and pension funds promising free post-retirement health care coverage under the city plan. *Id.* at 37. RCPA seeks declaratory and injunctive relief barring the implementation of the *Korshak* settlement agreement also embodied in the amendments to the Illinois Pension Code co-sponsored by the city and pension funds as part of the settlement.

Ten retired city employees who currently participate in the city's health care plan as annuitants under the police fund subsequently moved for intervention and simultaneously filed a motion for class certification in conjunction with RCPA.[1] Eight of the proposed intervenors retired and began to participate in the city health care plan prior to August 23, 1989. The remaining two intervenors did not retire until after August 23, 1989, but their retirement benefits vested prior to that date. *See* Ahlfield Motion to Intervene P 2. The motion for intervention was not accompanied by a pleading setting forth the claims for which intervention is sought, as required by Fed.R.Civ.P. 24(c). The intervenors purport to adopt the allegations of the complaint. However, the intervention motion asserts that all employees whose retirement benefits vested prior to August 23, 1989, also are entitled to the same benefits as pre-August 23, 1989 retirees. The accompanying motion for class certification filed in conjunction with that of the RCPA thus recasts the proposed class to reflect additional "vested" employees. The RCPA/intervenor motion requests certification of a class comprised of:

All persons participating in the City of Chicago Annuitant Healthcare Program whose participation is as or through a person who retired and began their participation after Dec. 31, 1987. RCPA motion for class certification P 1. However, the motion additionally requests certification of two subclasses: . . . One subclass [of] those who participate as or through a person who retired prior

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[1] The proposed individual intervenors are Thomas J. Ahlfield, Ignazio Bontempo, Patrick J. Boyle, Donald M. Jacobson, Michael Monaghan, Arthur Papineau, Laurence J. Thomas, Bob Valleyfield, William L. Tlapa and Stanley C. Lis.

to August 23, 1989. . . . Another [subclass of] those who participate as or through someone who vested in their City of Chicago Pension benefits on or before August 23, 1989, but retired after that date. *Id.*

The court has received a separate motion for intervention and class certification filed by the Coalition of Active and Retired Employees Political Action Committee (the "coalition"), two of its officers, and an additional individual intervenor. The coalition is an Illinois not-for-profit corporation organized to protect the retirement benefits of former city employees who receive annuities from--or are vested with an interest in—one of the four pension funds. Like the motion filed by the individual intervenors, the coalition's intervention motion is not accompanied by a pleading setting forth the claims for which intervention is sought, as required under Fed.R.Civ.P. 24(c). The coalition, which is represented by the same attorney representing RCPA and the individual intervenors, also purports to adopt the RCPA complaint, yet seeks to expand the class for certification. The coalition requests certification of a class comprised of: All persons presently participating in the City of Chicago Annuitant Healthcare Program who either began participating in the program or vested in their City of Chicago retirement benefits on or before August 23, 1989. Coalition motion for class certification P 8. In addition, the coalition seeks certification of three subclasses defined as: (1) Those whose participation is as or through a person retired and began their participation on or before December 31, 1987, (2) those who participate as or through a person who retired during the period January 1, 1988 through August 23, 1989 . . . , and (3) those who participate as or through someone who vested in their City of Chicago

pension benefits on or before August 23, 1989, but retired or will retire after that date. *Id.*

DISCUSSION

I. Class Certification

Rule 23 of the Federal Rules of Civil Procedure establishes a two-step procedure for determining when an action may appropriately proceed as a class action. Representative plaintiffs may sue on behalf of a class if (1) class members are so numerous that joinder of all members is impracticable; (2) questions of law or fact are common to the class; (3) claims or defenses of the representatives are typical of those of class members; and (4) the representatives will fairly and adequately represent the interests of the class. Fed.R.Civ.P. 23(a); *In re VMS Secur. Litigation*, 136 F.R.D. 466, 473 (N.D.Ill. 1991). Additionally, plaintiffs must satisfy one of the three subsections of Fed.R.Civ.P. 23(b). In the present action, plaintiffs seek certification under Rule 23(b)(2), which requires that the court find (1) the opposing parties' conduct or refusal to act must be generally applicable to the class, and (2) final injunctive or corresponding declarative relief is requested for the class.[2] Fed.R.Civ.P.

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[2] The complaint advances the proposed class as certifiable under Fed.R.Civ.P. 23(b)(2). Complaint P 11. The motions for class certification assert certification on Rule 23(b)(1), (2) and (3) grounds. Defendants object to certification on all three Rule 23(b) grounds. The motions for class certification appear to constitute an improper attempt to modify the pleadings that plainly state Rule 23(b)(2) as the basis of this action. *See Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 672 n. 3 (N.D.Ill.1989); *Ridings v. Canadian Imperial Bank of*

(continued...)

23(b)(2); 7A Wright, Miller & Kane, Federal Practice & Procedure, § 1775 at 447-48 (1986); *see Walters v. Thompson*, 615 F.Supp. 330, 335 (N.D.Ill.1985).

On a motion for class certification, the court's inquiry is limited to whether the requirements of Rule 23 have been satisfied; the court shall not consider the merits of the plaintiffs' claims. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 2152-53, 40 L.Ed.2d 732 (1974); *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill.1986). The party seeking class certification bears the burden of demonstrating that certification is proper. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372-73, 72 L.Ed.2d 740 (1982); *Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir.1984); *In re VMS Secur. Litigation*, 136 F.R.D. at 473.

Before proceeding to an analysis of the merits of the motions for class certification, a challenge to the motions to intervene requires initial attention. As noted above, the separately filed Ahlfield and coalition motions to intervene were not accompanied by the requisite pleadings setting forth the claims for which intervention is sought. Fed.R.Civ.P. 24(c). Plaintiffs contend that their adoption of the original complaint by reference in their motions to intervene is permitted under Fed.R.Civ.P. 10(c).

Plaintiffs' implicit assertion—that Rule 24(c) should not be applied in a needlessly technical manner—is well

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[2] (...continued)
Commerce Trust Co. (Bahamas), Ltd., 94 F.R.D. 147, 150 n. 3 (N.D.Ill.1982). In any event, plaintiffs' reply brief states that certification is sought solely pursuant to 23(b)(2). Plaintiffs' Reply Brief in Support of Intervention and Class Certification at 3. Analysis therefore proceeds solely on Rule 23(b)(2).

taken. A "motion to intervene may not just 'adopt' the pleadings of an original party." *Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir.1987). However, a district court has discretion to grant a procedurally inadequate motion if no prejudice results. *Id.* In the present motions, however, the proposed intervenors did not adopt the RCPA complaint outright. Each of the intervenors purport to adopt the RCPA complaint, but then attempt to effectuate a de facto amendment of the complaint by: (1) asserting facts in addition to those alleged in the complaint, and (2) redefining and significantly expanding the class definition advanced in the complaint. These significant modifications to the complaint render waiver of the Rule 24(c) pleading requirement inappropriate.

Additionally, the procedural flaw in the motions to intervene was raised by defendants well in advance of the completion of the first round of briefing on plaintiffs' motions for intervention and class certification. Rather than undertake modest but necessary corrective action during the lengthy briefing period, plaintiffs inexplicably chose not to address the problem. In the second round of briefs on the motion for reconsideration, plaintiffs proceed in the same curious vein. Instead of accompanying their brief with the requisite proposed pleading, the intervenors choose to employ a technical argument to excuse the procedural deficiencies in their motions to intervene. Under all these circumstances, waiver of the Rule 24(c) pleading requirement is inappropriate.

Denial of the motions to intervene moots the intervenors' accompanying motions for class certification. However, in anticipation of a belated attempt by the intervenors to refile procedurally correct motions, the court analyzes the merits of the proposed intervenors' motions

for certification as class representatives in the context of addressing RCPA's certification motion.

RCPA's class certification motion raises a second preliminary matter regarding the definition of the class to be certified. As noted above, RCPA's motion for class certification advances a different definition of the class than the definition in the complaint. RCPA's apparent attempt to amend the pleadings de facto through its motion for class certification is inappropriate. Analysis proceeds on the basis of the class definition stated in the complaint. *See Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 672 n. 3 (N.D.Ill.1989); *Ridings v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas), Ltd*, 94 F.R.D. 147, 150 n. 3 (N.D.Ill.1982).

1. Numerosity

The proposed class must be so numerous that joinder of all members is impracticable. The complaint need not allege the exact number or identity of class members. *In re VMS Secur. Litigation*, 136 F.R.D. at 473, citing *Patrykus v. Gomilla*, 121 F.R.D. 357, 360 (N.D.Ill.1988) (additional citation omitted). A finding of numerosity may be supported by common sense assumptions. *Id.*, citing *Grossman v. Waste Management, Inc.*, 100 F.R.D. 781, 785 (N.D.Ill.1984). In making a numerosity determination, the court additionally considers judicial economy and the ability of class members to institute individual suits. *Id.*, citing *Patrykus*, 121 F.R.D. at 361.

Plaintiffs estimate that thousands of annuitant beneficiaries of the four pension funds or their spouses or dependents began participating in the health care plan between January 1, 1988 and August 23, 1989. Defendants

do not dispute that the class is sufficiently large to satisfy the numerosity requirement and that joinder of all class members would be impracticable, if not impossible. Accordingly, the numerosity requirement of Rule 23(a) is satisfied. *See Hochschuler v. G.D. Searle & Co.*, 82 F.R.D. 339, 343 (N.D.Ill.1978) (class of over 1,000 is indisputably sufficient).

2. Commonality

The party seeking class certification must demonstrate that there is at least one question of law or fact common to the class. Fed.R.Civ.P. 23(a)(2); *In re VMS Secur. Litigation*, 136 F.R.D. at 473. "Not all factual or legal questions raised in a lawsuit need be common so long as a single issue is common to all class members." *Riordan v. Smith Barney*, 113 F.R.D. at 63 (citation omitted). Thus, class actions cannot be defeated on commonality grounds solely because there are some factual variations among the claims of individual members. *Id.*, citing *Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir.1980), *cert. denied*, 451 U.S. 914, 101 S.Ct. 1988, 68 L.Ed.2d 304 (1981). In the present case, the issues of whether the city and pension funds made binding promises regarding the provision of post-retirement health care coverage to annuitants and whether implementation of the *Korshak* settlement agreement breached the city and pension funds' alleged promises pose questions of law and fact common to all putative class members. *See, e.g., Spencer v. Central States, Southeast and Southwest Areas Pension Fund*, 778 F.Supp. 985, 989 n. 2 (N.D.Ill.1991) (issue of whether pension fund breached fiduciary duty in offering contributory service credit to some but not all benefit plan participants poses questions of law and fact common

to class of deprived plan participants). Accordingly, the commonality element is met in the present action.

3. Typicality

In order to certify a class, the claims of the representative plaintiffs must be typical of the class claims. Fed.R. Civ.P. 23(a)(3). While numerosity and commonality focus on the characteristics of the class, typicality and adequacy of representation focus on the characteristics of the class representatives relative to the class. *See* 1 H. Newberg, Newberg on Class Actions, § 3.13 at 163 (1985). Typicality, like adequacy of representation, insures that the interests of the named plaintiffs are sufficiently coextensive or interrelated with the interests of putative class members to ensure that the interests of class members will be adequately protected in their absence. *General Tel. Co.*, 457 U.S. at 157 n. 13, 102 S.Ct. at 2370 n. 13. Typicality exists if the putative class representatives' claims arise from the same event, practice or course of conduct that gives rise to the claims of the absent class members. 1 H. Newberg, Newberg on Class Actions, § 3.13 at 167 (1985). The court must determine if the "named representatives' claims have the same essential characteristics as the claims of the class at large." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir.1983); *In re VMS Secur. Litigation*, 136 F.R.D. at 474. To meet the typicality requirement, the named representatives must establish the bulk of the elements of each class member's claims when they prove their own. *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D.Fla.1990), citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *see also Spencer v. Central States*, 778 F.Supp. at 989-90.

As an initial matter, many of the proposed intervenor/ class representatives are not members of the putative class. It is an essential prerequisite of a class action that class representatives be members of the class they propose to represent. *Edmondson v. Simon*, 86 F.R.D. 375, 379 (N.D.Ill.1980); 7A Wright, Miller & Kane, Federal Practice & Procedure, ss 1761 at 132-33 (1985). The proposed class is comprised of: . . . [A]ll annuitants of the City of Chicago Police, Fire, Municipal and Laborers' Pension Funds and their spouses, survivors and dependents who are current participants in the City's Annuitant Healthcare Plan . . . and whose participation began after December 31, 1987, but prior to August 23, 1989. Proposed individual intervenors Arthur T. Cholly and Benedict Scacchiti retired and began participating in the annuitant health care plan prior to January 1, 1988. Coalition motion to intervene at 1 (Scacchiti "a pre-1988 retiree"); Cholly Dep. at 12, 49. Recognizing this fact, plaintiffs have withdrawn Cholly and Scacchiti as individual intervenors. Proposed individual intervenors William L. Tlapa and Stanley C. Lis retired after August 23, 1989. Ahlfield Motion to Intervene P 2; Tlapa Dep. at 13-14. Accordingly, these individuals are not properly class representatives.

The remaining proposed class representatives generally assert that their claims are typical of the claims of the class. Each putative class representative, it is argued, seeks to compel the city to fulfill its obligation to provide lifetime health care coverage and to compel the pension funds to fulfill their subsidy obligations. This unadorned assertion merely repeats plaintiffs' commonality argument. Although commonality is a necessary condition of typicality, standing alone it is not a sufficient condition

to establish typicality. Common requests for relief—a given in a case for declaratory and injunctive relief—or common legal theories do not establish typicality when the facts required to prove the claims are markedly different among class members. *Spencer v. Central States*, 778 F.Supp. at 990. Plaintiffs must establish that the underlying basis of their individual claims is significantly coextensive with the claims of the class generally. *See De La Fuente*, 713 F.2d at 232 (citations omitted).

The claims of the proposed class representatives hinge on representations allegedly made by the city and pension funds to thousands of city employees. The putative class representatives contend that these representations entitle them to free lifetime post-retirement health care coverage from the city, with part of the cost to be paid by the pension funds. They further assert that the representations were contractual in nature, with post-retirement health care constituting a term and condition of employment. Plaintiffs alternately argue that even if the representations did not create a contractual obligation, the annuitants relied on the representations to their detriment. On this theory, plaintiffs contend that the city and pension funds are equitably estopped from altering the previously existing coverage.

The communications allegedly supporting these claims, however, were not uniformly transmitted to all putative class members. The communications are alleged to have been made primarily in the form of oral presentations delivered by city health and benefits office agents at numerous, separately conducted and organized pre-retirement seminars for various city departmental employees. The present record provides substantive evidence only of seminars offered to police department employees. The indi-

viduals making the presentations to the police department employees did not appear before the prospective annuitants of the firemen, laborer and municipal funds. Kordeck Dep. 52-53. Thus, at the most fundamental level of inquiry into the underlying basis for the claims of class members, questions involving the content of the communications, the manner in which they were made, by whom they were made, and whether the speaker had a relationship sufficient to justify attribution of the statement to the city or pension funds will vary from class member to class member, depending on which city department and pension fund was involved. *See Spencer v. Central States*, 778 F.Supp. at 990-91.

Moreover, when an action "is based substantially on oral rather than written communications," as in the present case, "treatment as a class action is generally inappropriate." *Id.*, citing *Glick v. E.F. Hutton & Co.*, 106 F.R.D. 446, 449 (E.D.Pa.1985); *see also Graham v. Security Savings & Loan*, 125 F.R.D. 687, 691 (N.D.Ind.1989); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 888 (D.N.J. 1984). An exception to the rule disfavoring class actions rooted in oral representations applies in cases in which " 'essentially identical representations were made to all members of the proposed class.' " *Spencer v. Central States*, 778 F.Supp. at 991 n. 5, quoting *Glick*, 106 F.R.D. at 449. The plaintiffs bear the burden of demonstrating that the oral communications were uniform in nature. *Id.*; *Glick*, 106 F.R.D. at 450.

In the present case, the putative class representatives offer some evidence regarding oral presentations made by city health and benefits office agents at police pre-retirement seminars. *See* Kordeck Dep. at 47-59. Plaintiffs do not offer any evidence regarding communications to

the prospective fire, laborer and municipal fund annuitants, let alone evidence that might support an inference that the communications made to the fire, laborer and municipal annuitants were typical of the communications made at the police pre-retirement seminars. Indeed, the fact that the individuals who communicated to future police annuitants had no knowledge of pre-retirement seminars offered to future firemen, laborer or municipal fund annuitants suggests that the presentations likely varied among the four pension fund annuitant groups. Kordeck Dep. at 52-53. *See Spencer v. Central States*, 778 F.Supp. at 990-91. In proving their own claims, the remaining proposed individual class representatives, who are culled exclusively from the ranks of police department retirees, would not be able to establish a core element of the claims of fire, municipal and laborer annuitant class members.

Similarly, RCPA is comprised solely of retired police department employees and their spouses. Thus, RCPA is no better situated to vindicate the claims of fire, municipal and laborer annuitant class members than any of the proposed individual class representatives. The coalition membership manifests a similar flaw, as it is comprised almost exclusively of active and retired police and fire department employees. Cholly Dep. 33-34. The coalition has not offered any direct evidence regarding the basis of the claims of their fire annuitant members. Additionally, the record is barren of evidence relating to the claims of municipal and laborer annuitants, who are not visible in the membership ranks of the coalition or in the present class action proceedings. The coalition has failed to meet its burden of establishing the requisite uniformity in the oral representations allegedly made to its admittedly broader constituency.

Even within the retired police context, for which the record offers at least some basis for analysis, the evidence offered for class certification purposes does not establish uniformity in the oral communications made at the pre-retirement seminars. Herbert Kordeck, the city health and benefits office agent who allegedly made the binding oral communications regarding annuitant health care benefits to future police annuitants, testified in his class certification deposition that he stopped participating in the retirement seminars in April 1986. Kordeck Dep. at 5. The putative individual class representatives attended pre-retirement seminars from 1987 to 1989. Ahlfield Aff. P 2; Boyle Aff. P 2; Thomas Aff. P 2; *see also* Tlapa Aff. P 2. Kordeck's testimony therefore lacks foundation concerning the uniformity of the presentations made to the proposed class representatives. Because Kordeck's testimony is the sole evidence offered by the proposed class representatives addressing the uniformity in the presentation made at the pre-retirement seminars, the proposed class representatives have not met their burden of establishing that the oral representations were standardized and uniform. *Spencer v. Central States*, 778 F.Supp. at 991 n. 5 (citations omitted).

More significantly, most of the proposed individual class representatives did not attend any of the pre-retirement seminars at which the city and pension funds allegedly made the binding representations. *See* Valleyfield Aff. P 2; Jacobson Aff. P 2; Bontempo Aff. P 2; Monaghan Aff. P 2; Papineau Aff. P 2; *see also* Lis Aff. P 2; Cholly dep. at 57. The basis for the claim of entitlement to benefits of these individuals varies. Proposed intervenor Valleyfield bases his claim of entitlement solely on the fact that he worked for the city police department his entire

career. *See* Valleyfield Aff. P 3. Proposed intervenor Papineau bases his entitlement claim solely on his "many years of devotion and loyalty to the people of Chicago." Papineau Aff. P 3. Patrick Boyle similarly does not base his claim of lifetime health care coverage on direct representations made by city or pension fund agents, but on word of mouth from police officers he supervised and police retirees. Boyle dep. at 18-19. *See also* Bontempo Aff. P 3; Monaghan Aff. P 3; Lis Aff. P 3; Cholly dep. at 57-58.[3]

All told, the proposed class representatives fail to establish a uniformity in the oral communications upon which they base their claims. At a more general level, they have failed to establish that their claims are uniformly based on oral representations or written communications from the city or pension funds. The court concludes, therefore, that the claims of the proposed class representatives do not "arise from the same event or practice or course conduct that gave rise to the claims of the other class members." *De La Fuente*, 713 F.2d at 232.

Plaintiffs' estoppel claims also fail to satisfy the typicality required for class certification. The extent to which each class member relied on the various oral representations is relevant to the estoppel theory advanced in the complaint. *See National Ben Franklin Ins. Co. v. Davidovitch*, 123 Ill.App.3d 88, 93, 78 Ill.Dec. 577, 581, 462 N.E.2d 696, 700 (1st Dist.1984) (under Illinois law, party

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[3] The complaint also alleges that the claims of entitlement to lifetime health care arise from written materials distributed by the city and/or pension funds to the annuitant class members. Notably, none of the proposed individual class representatives base their claims upon written representations.

claiming benefit of estoppel must prove "reasonable reliance upon the acts or representations of the party sought to be estopped, without knowledge of or convenient means of learning the true facts") (citations omitted). The varying nature of the communications upon which the estoppel claims are based only magnifies the obvious fact that reliance varies from individual to individual.

Plaintiffs contend that their estoppel claim will not require individualized inquiry into the reliance of each employee because employer representations regarding a term and condition of employment are established under Illinois law when an employee continues to work for an employer until retirement. Plaintiffs cite only *Buddell v. Board of Trustees*, 118 Ill.2d 99, 112 Ill.Dec. 718, 514 N.E.2d 184 (1987), in support of their reliance argument. *Buddell* involved the issue whether a provision of the Illinois Pension Code denying a state employee's right to purchase additional credit in the state university retirement system violated the Illinois Constitution's prohibition against impairing pension benefits. *Buddell* does not remotely allude to the issue of employee reliance on employer representations, as plaintiffs contend. *Buddell* is therefore inapposite. Plaintiffs' estoppel claim inescapably requires individualized inquiry into reliance and whether reliance was reasonable in widely varying individual circumstances. Accordingly, potential defenses unique to a subset of the class also defeats typicality. *See Spencer v. Central States*, 778 F.Supp. at 990-91; *McNichols v. Loeb Rhoades & Co.*, 97 F.R.D. 331, 334-35, 346 (N.D.Ill.1982) (arguable reliance defense peculiar to named plaintiffs or small subset of plaintiffs may destroy typicality), citing *J.H. Cohn & Co. v. American Appraisal Associates, Inc.*, 628 F.2d 994 (7th Cir 1980).

Failure to meet the Fed.R.Civ.P. 23(a)(3) typicality requirement obviates the need to consider arguments regarding adequacy of representation pursuant to Rule 23(a)(4) and the Rule 23(b) factors. *See United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 572 F.Supp. 1494, 1500 (N.D.Ill.1983). However, as an independent basis for denial of class certification, the court addresses certain aspects of plaintiffs' adequacy as class representatives.

4. Adequacy of Representation

In determining whether the named plaintiffs adequately represent the interests of the class, the court examines two factors: (1) whether conflicts of interest exist between the representatives and the rest of the class members, and (2) whether plaintiffs' counsel will adequately protect the interests of the class. *In re VMS Secur. Litigation*, 136 F.R.D. at 478; *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir.1986); 1 H. Newberg, Newberg on Class Actions § 3.22 at 198 (1985).

a. Conflicts of Interest

The interests of a class representative must be wholly compatible with and not antagonistic to the interests of the class. *Hansberry v. Lee*, 311 U.S. 32, 44-45, 61 S.Ct. 115, 119-20, 85 L.Ed. 22 (1940); *United Indep. Flight Officers, Inc. v. United Air Lines, Inc*, 572 F.Supp. at 1500; *Edmondson v. Simon*, 86 F.R.D. at 382; Wright, Miller & Kane, 7A Federal Practice & Procedure, § 1768 at 326 (1986). RCPA Executive Secretary Richard Jones was a member of the board of trustees of the police fund at the time the *Korshak* settlement between the city and

pension funds was approved. The present complaint alleges that annuitant fund trustees breached their fiduciary duty to their annuitants by approving the *Korshak* settlement. Consequently, Jones and the RCPA leadership are plainly beset with a conflict of interest that may hinder vigorous prosecution of the present action. That conflict is brought to a finer point by evidence that Jones himself voted in favor of the *Korshak* settlement while acting in his capacity as a police fund trustee. *See* McDonough Dep. at 140 (police fund trustees unanimously approved *Korshak* settlement).

Additionally, RCPA has not supported its contention that its membership is substantially united in its opposition to the *Korshak* settlement. The RCPA membership is not limited to only participants in the city's annuitant health care plan whose premiums increased as a result of the *Korshak* settlement. The membership ranks also include annuitants who, at least temporarily, have benefited from the *Korshak* settlement and whose position will be worsened should the present action succeed. Pierce dep. at 112-13; Boyle dep. at 84- 86. Moreover, a full 25 percent of the RCPA membership does not participate in the city's annuitant health care plan. As the city and pension funds note, these RCPA subgroups within the putative class pose a risk of real conflict within the RCPA over its present attempt to bar implementation of the *Korshak* settlement. *See United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 572 F.Supp. at 1500 (subgroup within class who benefited from action that class is challenging poses "very real risk of conflict" within class). Although this potential conflict alone may or may not preclude RCPA representation of the putative class, it constitutes a significant additional factor weigh-

ing against certification of RCPA as a class representative, particularly in light of the fact that class members in a Rule 23(b)(2) action seeking injunctive relief cannot "opt out" of the class, unlike a Rule 23(b)(3) action. 1 H. Newberg, Newberg on Class Actions, § 3.30 at 214 (1985).

The financing of the present action also is troubling. At an earlier stage of these proceedings, the court was asked to review RCPA board and membership meeting minutes, as well as monthly reports issued by the RCPA board to its members. This documentary evidence included direct solicitation of the membership for donations to finance ongoing activities not only in the present case, but also in litigating the *Korshak* appeal. The existing record on this issue falls short of permitting express findings of fact. However, the record suggests that RCPA's participation in and contribution of resources to the *Korshak* litigation, which involves a membership faction distinct from the putative class in the present action, may be draining limited resources that would otherwise be devoted to prosecuting this case. RCPA's ongoing *Korshak* activities against the same defendants, but on behalf of an entirely distinct annuitant class, pose the potential of impairing RCPA's current ability to vigorously prosecute the present action.

Proposed class counsel contends that inquiry into the financial ability of the class representatives to effectively pursue the present class action is inappropriate. Counsel's contention flies in the face of case law clearly holding that class representatives' ability to adequately finance litigation of a class action is relevant to the question of adequacy of representation. *See Brooks v. Southern Bell Tel. & Tel. Co.,* 133 F.R.D. at 58-59 (class repre-

sentatives' ability to adequately finance action relevant to adequacy of representation inquiry), citing *Susman v. Lincoln Am. Corp.*, 561 F.2d 86 (7th Cir.1977). The court acknowledges that "there is nothing wrong with other class members contributing to the heavy expenses of litigating a class action suit." *Grace v. Perception Technology Corp.*, 128 F.R.D. 165, 171 (D.Mass 1989). However, plaintiffs' counsel adamantly asserts that the present action is not being financed by the putative class members. Instead, he represents in no uncertain terms that he alone is advancing all litigation costs, and repayment is contingent on the outcome of the case.

Viewing the financing of the present action through a lens of counsel's own making, his insistence that he is advancing all litigation costs is sharply contradicted by evidence the court has examined in adjudicating discovery motions. For example, in a October 1991 newsletter to its membership, RCPA reprinted a letter from plaintiffs' counsel to RCPA President John Pierce. In the published letter, plaintiffs' counsel stated that the expense of litigating the present class action was "very substantial and growing . . . and we need your help. We need money to help defray the expenses of litigation. . . ."[4]

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[4] More recently, in a letter from plaintiffs' counsel to RCPA president Pierce reprinted in the January 1992 RCPA newsletter, counsel states: We need further financial help. . . . We need your financial commitments and assistance critically at this time just to defray expenses. . . . If each annuitant would contribute one month's new premiums to help in our costs, we would have an appropriate war chest for conducting the battle. We need your help. The January 1992 newsletter then directs all RCPA members wishing to make a contribution to mail checks payable to "Clinton Krislov," plaintiffs' counsel. RCPA

(continued...)

RCPA Newsletter, October 1991, at 2 (appended to RCPA's motion for clarification on attorney-client privilege). Given his repeated solicitations for financial assistance in defraying litigation expenses, particularly to an organization that plaintiffs' counsel himself has characterized as comprised of retirees of modest means, counsel's insistence that he alone is advancing all litigation costs and that he is able to adequately finance the present action are not persuasive.

b. Adequacy of Plaintiffs' Counsel

The adequacy of representation requirement also raises concerns about the potential conflicts of plaintiffs' counsel. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. at 157 n. 13, 102 S.Ct. at 2370 n. 13. Plaintiffs' counsel is general counsel to RCPA itself.[5] The manifest conflict of interest within the RCPA leadership taints the appropriateness of RCPA's general counsel acting as class counsel, particularly in light of the close relationship between counsel and the RCPA leadership. *See Wagner v. Lehman Bros. Kuhn Loeb, Inc.*, 646 F.Supp. 643, 661 (N.D.Ill. 1986) (attorney for class representative must be able to stand in fiduciary relationship to absent class members

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[4] (...continued)
Newsletter, January 1992, at 2 (appended to city's response to RCPA memorandum on the issue of RCPA standing).

[5] Plaintiffs' counsel contends that he is merely "honorary counsel" rather than RCPA general counsel. The letterhead of the January 1992 newsletter sent to all RCPA members lists plaintiffs' counsel as both RCPA director and general counsel. RCPA Newsletter, January 1992, at 1 (appended to city's response to RCPA memorandum on the issue of RCPA standing).

as well as to class representatives). Additionally, the potential for conflicts within the RCPA membership stemming from the potentially harmful impact of the requested relief on RCPA members who have benefited from the *Korshak* settlement agreement threatens to place counsel in an untenable position in simultaneously representing the interests of all putative class members. Plaintiffs' counsel's status as RCPA general counsel also taints the propriety of counsel's continued representation of the coalition as a proposed class representative. In light of all these circumstances, and most particularly counsel's fiduciary obligations to the conflicted RCPA leadership, plaintiffs' counsel cannot adequately represent the putative class members. Plaintiffs therefore have failed to demonstrate that they satisfy the Rule 23(a)(4) adequacy of representation requirement.

II. Standing

RCPA pursues the present action solely in its capacity as the associational representative of its members. RCPA's inadequacy as class representative precludes it from continued participation as the representative of the RCPA membership. Therefore, the court, on its own motion, directed the parties to brief the issue of RCPA's standing to continue as a party plaintiff.[6]

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[6] Early in this litigation, this court concluded that RCPA "has standing as representative of its members." *Retired Chicago Police Association v. City of Chicago*, slip op. at 6, 1990 WL 78306 (N.D.Ill. June 4, 1990). RCPA contends that this ruling constitutes the law of the case and implies that the prior ruling is not subject to revision or reconsideration after further development of the record. However, an order "is subject to

(continued...)

An association may have standing to: (1) redress an injury to itself, or (2) obtain relief on behalf of its members. *See Pennell v. City of San Jose*, 485 U.S. 1, 7, 108 S.Ct. 849, 855, 99 L.Ed.2d 1 (1988); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976); *Freedom from Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1469 (7th Cir.1988). RCPA does not seek to redress an injury to itself. See *RCPA v. City of Chicago*, No. 90 C 407 slip op. at 4, 1990 WL 78306 (N.D.Ill. June 4, 1990). The only question is whether RCPA has standing to obtain relief on behalf of its members.

An organization has associational standing to seek judicial relief on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 342- 43, 97 S.Ct. 2434, 2440-41, 53 L.Ed.2d 383 (1977). *See also Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988). The court need not address the first two requisite elements for associational standing, because RCPA clearly fails to meet the third

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[6] (...continued)
revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all of the parties." Fed.R.Civ.P. 54(b); *see Continental Casualty Co. v. Great American Ins. Co.*, 732 F.Supp. 929, 931-32 (N.D.Ill.1990); *Beeman v. Safeway Stores, Inc.*, 724 F.Supp. 674, 679 (W.D.Mo. 1989). The court has yet to issue a final order adjudicating the claims of all parties, nor has the prior ruling been certified as final and appealable. *See* Fed.R.Civ.P. 54(b).

element; namely, that "neither the claim asserted nor the relief requested require[ ] the participation of individual [association] members in the lawsuit." *Hunt*, 432 U.S. at 342-43, 97 S.Ct. at 2441.

RCPA seeks only declaratory and injunctive relief. As this court has previously recognized, the relief requested by RCPA does not require individualized inquiry into the fact and extent of damages. *See RCPA v. City of Chicago*, No. 90 C 407, slip op. at 5, 1990 WL 78306 (N.D.Ill. June 4, 1990). Citing *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), RCPA contends that it meets the third element for establishing associational standing merely because it seeks only injunctive and declaratory relief.

In *Warth*, the plaintiff association sought monetary relief for alleged injuries to its members. The damages claims were not common to all of the association's members, nor were they shared in equal degree by the injured members. The nature of the damages sought thus required individualized inquiry into the fact and extent of the injury to each member of the association. In concluding that the association lacked standing to seek relief on its members' behalf, the Court stated that whether an association has standing to invoke [a] court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. *Warth*, 422 U.S. at 515, 95 S.Ct. at 2213.

Plaintiffs contend that the quoted passage from *Warth* should be read as permitting associational standing

under *Hunt* whenever an association seeks only injunctive or declaratory relief on behalf of its members. The court disagrees. *Warth* merely recognizes the reality that actions seeking declarative or injunctive relief rarely require individualized inquiry into the question of damages. Conversely, actions seeking monetary relief seldom provide an appropriate basis for associational standing because injuries typically are peculiar to each individual member and thus require individualized inquiry into the fact and extent of injury. *Id.*, 422 U.S. at 515-16, 95 S.Ct. at 2214-15; *see also Rockford v. Principals and Supervisors Ass'n v. Board of Education*, 721 F.Supp. 948, 950-51 (N.D.Ill.1989). No court has allowed associational standing in a case seeking monetary relief. The fact that an association seeks injunctive and not monetary relief merely lessens the potential need for individual member participation. *Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1381 (7th Cir.1987). It does not necessarily foreclose the need for individual member participation. *See Id.*

In focusing almost exclusively on the nature of the relief requested, RCPA ignores the equal significance of the nature of the claim to the fulfillment of the third element of associational standing. *See Hunt*, 432 U.S. at 342-43, 97 S.Ct. at 2440-41. Where the claim advanced by an association on behalf of its members presents a pure issue of law, the participation of individual members of an association is usually unnecessary and associational standing is appropriate. *See, e.g., International Union, UAW v. Brock*, 477 U.S. 274, 287, 106 S.Ct. 2523, 2531, 91 L.Ed.2d 228 (1986) (associational standing found where "suit raises a pure question of law"). However, where the nature of the claim involves questions of fact

that require the participation of individual members, associational standing is not appropriate even when the association seeks only injunctive relief. *Southwest Suburban Board of Realtors*, 830 F.2d at 1381.

As noted in the discussion of class certification, RCPA's claim that its members are entitled to free lifetime health care coverage is based on a broad array of communications, both written and oral, direct and indirect, emanating from countless sources. The present action clearly requires individualized proof and individual member participation to determine the time, place, source and content of the communications that are the core of this litigation. *See Rockford Principals and Supervisors Ass'n v. Board of Education*, 721 F.Supp. at 950 (associational standing inappropriate where "[i]ndividualized proof will be necessary to prove the existence of the alleged contractual-type relationships whether termed as 'mutually explicit understandings' or implied employment contracts").

Similarly, RCPA's estoppel claim requires individualized inquiry into the members' reliance on various alleged communications. The need for individualized proof as to each class member's state of mind renders associational standing inappropriate. *See, e.g., Rockford Principals and Supervisors Ass'n v. Board of Education*, 721 F.Supp. at 950 (implied contract claim requires proof of individual association members' state of mind, making associational standing inappropriate); *Simer v. Rios*, 661 F.2d 655, 682 (7th Cir.1981), *cert. denied*, 456 U.S. 917, 102 S.Ct. 1773, 72 L.Ed.2d 177 (1982) (individualized inquiry into state of mind makes associational standing inappropriate). The nature of the claims advanced by RCPA makes the participation of its members "indispens-

able to the proper resolution of the cause." *Warth*, 422 U.S. at 511, 95 S.Ct. at 2212. Because the nature of the claims of its members are not susceptible of presentation "in a group context," *Hunt*, 432 U.S. at 344, 97 S.Ct. at 2442, RCPA lacks the requisite associational standing to invoke the remedial powers of this court on behalf of its members.

CONCLUSION

The motion of plaintiff Retired Chicago Police Association and the proposed intervenors for reconsideration is granted. The February 6, 1992 memorandum opinion and order is vacated. The motions to intervene are denied. The proposed intervenors' motions for class certification are denied as moot. Retired Chicago Police Association's motion for class certification is denied. The complaint of the Retired Chicago Police Association is dismissed for lack of standing. The complaint is dismissed without prejudice as to purported class members.

RETIRED CHICAGO POLICE ASSOCIATION, et al., Plaintiffs,

v.

THE CITY OF CHICAGO, et al., Defendants.

No. 90 C 407.

United States District Court, N.D. Illinois, E.D.

June 5, 1990.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

The Retired Chicago Police Association ("the police association") sues the City of Chicago, three of its officers, and four pension funds for declaratory and injunctive relief. The police association alleges that a settlement agreement between the city and the pension funds violates some of its members' constitutional rights under 42 U.S.C. § 1983. The police association also asserts several pendent state claims. Jurisdiction is invoked under 28 U.S.C. §§ 1331 and 1343 based on the alleged constitutional violations. The pension funds move to dismiss the complaint on several grounds or, alternatively, to abstain pending final resolution of a related case in the Illinois appellate court.

BACKGROUND

The police association objects to recent changes in healthcare coverage that Chicago provides its employees. Since 1982, the City of Chicago Annuitant Healthcare Plan ("the healthcare plan") provided lifetime health insurance for employee participants. The monthly premium

for the healthcare plan was $21 if the annuitant was qualified to receive medicare and $55 for all others. Ill. Ann.Stat. ch. 108 1/2, P 5-167.5 (Smith-Hurd 1987). The monthly premium for participants was paid by the pension funds, requiring participants to pay only the premium charges for spouses and children.[1] The pension funds are financed through a special tax. *Id.* at 5-168.

In October 1987, the city informed the pension funds that it would no longer pay for healthcare coverage. The city sued the pension funds in the Circuit Court of Cook County to recover approximately $58 million it spent on healthcare benefits since 1980 and for a declaration that it need not pay for future benefits. *City of Chicago v. Korshak*, No. 87 CH 10134. Individual participants in the healthcare plan intervened. The intervenors and pension funds counterclaimed to force the city to continue paying for most of the cost of the healthcare plan. The state court dismissed the city's complaint, finding that the pension funds had no obligation to reimburse the city for health care benefits. In June 1988, the state court held a bench trial on the counterclaims.

The pension funds and the city settled the case before the state court ruled on the counterclaims. The pension funds and the city agreed to initiate legislation to change the Illinois Pension Code. Under the terms of the settlement, an independent actuary is to estimate the aggregate cost of claims and premiums for calendar years 1989

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[1] The amount of premium payments are those of the Policemen's Annuity and Benefit Fund because the police association represents individuals covered under this pension plan. The amount of the premium payments made by the three other pension plans varies slightly.

through 1997. The city is to set a new monthly premium based on the determination of the actuary. Once the increased premiums take effect, the city will pay at least fifty percent of the cost of the healthcare claims. The pension funds will pay the city up to $65 each month for non-medicare annuitants and up to $35 each month for medicare annuitants from 1988 through 1992. From 1993 through 1997 the funds' subsidies will increase by $10 per annuitant per month. In addition, the pension funds will pay healthcare benefits for widows and widowers of annuitants. The legislation sponsored by the settlement agreement was enacted on August 23, 1989. Pub.Act 86-273, 1989 Ill.Legis.Serv. 1984-85 (West).

Prior to a fairness hearing on the settlement, the state court certified the intervenors as a class. The intervenors represented individuals who were receiving healthcare benefits paid for by one of the four pension plans as of December 31, 1987. The state court denied the police association's motion to intervene and permitted its president to testify at the fairness hearing only in his capacity as a member of the class. The state court approved the settlement. The intervenors appealed the settlement to the Illinois appellate court. *City of Chicago v. Korshak*, 1st Dist., 3d Div. No. 89-3451. On February 14, 1990, the state appellate court enjoined the city from changing the terms of the healthcare plan pending appeal. The police association filed its complaint in this court on January 24, 1990.

DISCUSSION

On a motion to dismiss, the court must accept the well-pleaded allegations of the complaint as true and view

those allegations in the light most favorable to the plaintiff. *Gillman v. Burlington Northern R.R. Co.*, 878 F.2d 1020, 1022 (7th Cir.1989). A complaint should be dismissed only if it is clear that no relief could be awarded consistent with the allegations of the complaint. *Gomez v. Illinois Bd. of Educ.*, 811 F.2d 1030, 1039 (7th Cir. 1987).

Standing

The pension plans argue that the police association does not have standing to assert the rights of its members. The police association sues on its own behalf and on behalf of its members who are participants in the healthcare plan whose participation began after 1987, but before August 23, 1989. An association has standing to seek judicial relief from injury to itself. *Warth v. Seldin*, 422 U.S. 490, 511 (1974). The police association does not allege that the settlement injures it; only its members. In the absence of injury to itself, an association may have standing solely as a representative of its members when:

(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and

(c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Assoc., 830 F.2d 1374, 1380 (7th Cir. 1987), quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Some members of the police association are threatened with paying more for health insurance by the terms of the settlement.

Moreover, the police association's attempt to remedy these injuries is central to the association's purpose of promoting and protecting retirement benefits for retired Chicago police officers.

The pension plans contend that the police association does not have standing to represent its members because the injury to each member is different and, thus, would require participation by individual members. All injured members are presumed to be benefited when the relief sought is declaratory or injunctive, as it is here. *Warth*, 422 U.S. at 515. Although the relief sought by the police association may affect each of its members differently, individual participation is not necessary to adjudicate the dispute. *See Southwest Suburban Bd. of Realtors*, 830 F.2d at 1381 (association did not have standing to assert antitrust injury to its members where proof involved actions taken against individual members). The pension plans' contention that the police association is not an adequate representative will be more appropriately addressed in a response to the police association's motion for class certification under Fed.R.Civ.P. 23. The police association has standing as a representative of its members.

Federal Claims

The pension funds argue that the police association's complaint fails to state a federal claim for which relief may be granted and that jurisdiction should not be exercised over the pendent state claims. The police association alleges civil rights violations based on a denial of due process and equal protection, and a violation of contractual obligations. The pension plans do not deny that

participants in the healthcare plan have a property interest in continuing health care benefits. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *D'Acquisto v. Washington*, 640 F.Supp. 594 (N.D.Ill.1986). The police association's complaint alleges that the changes in health care coverage provided for in the settlement deprives its members of those property interests without due process of law. The pension funds contend that due process was satisfied by the state court's fairness hearing. The police association, however, represents members who are not part of the intervening class in *Korshak*. Notice of the settlement explicitly excluded participants represented by the police association in this action. The adequacy of the fairness hearing is not properly before this court on a motion to dismiss. Liberally construing the complaint, the police association states a claim for violation of due process. It is unnecessary to address the police association's equal protection and contract clause claims at this time.

Fiduciary Duty

The police association names the pension funds as defendants alleging that they breached their fiduciary duties. The pension funds argue that the police association's complaint fails to state a claim for breach of fiduciary duty because it relies on an assertion that the settlement terminates obligations to pay for annuitant health care after 1997. The complaint also alleges that the terms of the settlement increase premium payments. Whether the pension funds' approval of the settlement was in the best interests of all annuitants is a question of fact that cannot be resolved on a motion to dismiss.

Res Judicata

The pension funds' argument that the current state court proceeding is res judicata to this case requires consideration of material outside the pleadings. The pension funds have not submitted the state court complaint necessary to evaluate the identity of the parties and claims. Accordingly, it is improper to address the pension funds' res judicata argument at this time.

Abstention

The pension plans request this court to abstain from exercising jurisdiction over this case under the rule articulated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Abstention from the exercise of federal jurisdiction is an extraordinary and narrow exception to the duty of a district court to adjudicate a case properly before it. *Colorado River*, 424 U.S. at 813. Nonetheless, the court should abstain from exercising its jurisdiction where adjudication in a parallel state court case would serve an important countervailing interest. Id.

The police association argues that *Korshak*, the state court case on appeal, is not parallel because the parties are not the same. Cases are parallel if substantially the same parties are contemporaneously litigating substantially the same issues in two different courts. *Medema v. Medema Builders, Inc.*, 854 F.2d 210, 213 (7th Cir.1988). The intervenors in *Korshak* represent all participants in the healthcare plan on December 31, 1987. The plaintiff here represents individuals whose participation in the healthcare plan began after 1987. Although no party has submitted the intervenors' appeal in *Korshak*, the police

association does not deny that the issues presented are substantially the same. Both the intervenors in *Korshak* and the police association here seek to have the court mandate lifetime health care benefits for them under pre-1987 terms. The only claim that the police association presents unique to the members it represents here is a due process violation for preventing their intervention in *Korshak* and precluding their testimony at the fairness hearing. The due process claim is not central to the police association's complaint. The police association's lengthy response to the pension funds' motion devotes only one page to its civil rights claim. The intervenors in *Korshak* and the police association in this action represent participants who have identical incentives to contest the settlement. The requirement for abstention is that the parties be substantially the same, not identical. *Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir.1988). Accordingly, the federal and state cases are sufficiently parallel to warrant abstention.

This court has a virtually unflagging obligation to exercise jurisdiction over this case, even when a parallel state court proceeding exists. *Colorado River*, 424 U.S. at 811. At least ten factors are relevant when determining whether to defer to the concurrent jurisdiction of the state court.

1) whether the state has assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which jurisdiction was obtained by the concurrent forums; 5) the source of governing law, state or federal; 6) the adequacy of state court action to protect the federal plaintiff's rights; 7) the relative progress of state

and federal proceedings; 8) the presence or absence of concurrent jurisdiction; 9) the availability of removal; and 10) the vexatious or contrived nature of the federal claim.

LaDuke v. Burlington Northern R.R. Co., 879 F.2d 1556, 1559 (7th Cir.1989), citing *Lumen Constr., Inc. v. Brant Constr. Co., Inc.*, 780 F.2d 691, 694 (7th Cir.1985). The weight given to any particular factor will vary greatly depending on the particular factual setting. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983).

Here, the desirability of avoiding piecemeal litigation and the relatively substantial progress of *Korshak* are powerful incentives to abstain. Simultaneous litigation wastes scarce judicial resources and may threaten the legitimacy of the court system. *Lumen*, 780 F.2d at 694. The potential for unfairness to the parties is aggravated by the fact that their case has been handled now for over two years in state court, but has only recently been brought in this court.

The police association argues that abstention is not favored when the plaintiff in the federal case asserts a civil rights claim, citing *Devlin v. Sosbe*, 465 F.2d 169 (7th Cir.1972); and *Wall v. American Optometric Ass'n, Inc.*, 379 F.Supp. 175, 183 (N.D.Ga.), *aff'd*, 419 U.S. 888 (1974). Both of these cases discuss abstention under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), not *Colorado River*. Nonetheless, the district court's decision to abstain was affirmed in *Devlin*. Both *Devlin* and *Wall* found abstention disfavored where first amendment rights may be impaired by the mere threat of prosecution under a vague or overbroad statute. *See, e.g., Baggett v. Bullitt*, 377 U.S. 360, 378 (1964), cited in

Devlin, 465 F.2d at 172. Abstention here would not additionally impact the police association's constitutional rights.

The only factor weighing against abstention is the adequacy of the state court proceeding because the police association's due process claim is not presented in *Korshak*. The state court intervenors were all given the opportunity to testify at the fairness hearing. The presence of a § 1983 claim is a factor to be weighed in determining whether abstention is warranted. *See Lumen*, 780 F.2d at 697. The police association's § 1983 claim before this court, however, is insufficient to prevent abstention for two reasons. First, as stated earlier, the due process claim is not central to the police association's motion for summary judgment. The timing of this complaint three months after the police association's motion to intervene was denied, one month after the approval of the settlement agreement, and two weeks before the appellate court's injunction, suggests that the federal claim is contrived to relitigate issues adjudicated in the state court. More importantly, any constitutional inadequacy in the state court proceeding may be addressed later by this court. Abstention does not impair the police association's due process claim where the federal court orders a stay rather than a dismissal. *See Interstate Material*, 847 F.2d at 1289-90. The state appellate court has enjoined the city from changing the terms of the healthcare plan pending the outcome of the appeal. Accordingly, abstention is proper in this case.

CONCLUSION

The pension funds' motion to dismiss is denied. The pension funds' motion to abstain is granted. This case is stayed pending final resolution of *City of Chicago v. Korshak*. The parties are directed to advise this court of the progress of *Korshak* at a status hearing on December 11, 1990 at 9:00 a.m. All other set dates, including briefing schedules on pending motions, are vacated.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 4, 1996

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

Nos. 94-1885, 94-2404, 94-2580,
94-2719, 94-2950 & 94-2965

RETIRED CHICAGO POLICE ASSOCIATION,

Plaintiff-Appellant

and

CLINTON A. KRISLOV,

Appellant / Cross-Appellee,

and

KRISLOV & ASSOCIATES, LTD.,

Appellant,

v.

CITY OF CHICAGO, WALTER KNORR,
RICHARD M. DALEY, MIRIAM SANTOS,
and the POLICEMEN'S ANNUITY
AND BENEFIT FUND,

Defendants-Appellees,

and

FIREMAN'S ANNUITY AND BENEFIT FUND,

Defendant-Appellee / Cross-Appellant.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 90 C 407 and 91 C 6200—Suzanne Conlon, *Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-captioned case, all of the judges on the original panel have voted to deny the petition for rehearing.

IT IS ORDERED that the petition for rehearing is hereby DENIED.